


1987

The Removal Power and the Federal Deficit: Form, Substance, and Administrative Independence

Jonathan L. Entin

Case Western Reserve University

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Entin, Jonathan L. (1987) "The Removal Power and the Federal Deficit: Form, Substance, and Administrative Independence,"
Kentucky Law Journal: Vol. 75 : Iss. 4 , Article 2.
Available at: <https://uknowledge.uky.edu/klj/vol75/iss4/2>

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The Removal Power and the Federal Deficit: Form, Substance, and Administrative Independence

BY JONATHAN L. ENTIN*

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* Assistant Professor of Law, Case Western Reserve University.

The author gratefully acknowledges the generosity of Melvyn Durchslag, William Marshall, and Richard Myers for their very helpful criticisms of an earlier draft and of Laura Chisolm, Ronald Coffey, and Maxwell Mehlman for their stimulating conversations about several matters discussed in this Article. Charles Cole graciously afforded access to some useful historical materials. Anne Sturtz provided able research assistance. None of these persons bears any responsibility for the remaining errors of omission and commission.

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INTRODUCTION

Almost from the beginning of the Republic, Congress and the President have sparred over their respective powers.¹ These

¹ Early on, the executive branch played a relatively minor role in both the legislative process and in administration. One significant exception to this executive dependency was in foreign affairs, where early Presidents took a good deal of initiative. Examples include Jefferson's undertaking the Louisiana Purchase and Monroe's unilateral promulgation of the doctrine that bears his name. Andrew Jackson seized the initiative from Congress on a number of fronts, generating intense controversy in the process and leading to a subsequently reversed Senate censure resolution. Jackson was followed by a series of weaker executives until the election of Abraham Lincoln, who held office during a period of unprecedented national crisis. *See generally* E. HARGROVE & M. NELSON, *PRESIDENTS, POLITICS, AND POLICY* 45-50 (1984).

Since the Civil War, the federal government has undertaken vastly increased responsibilities. In the latter part of the nineteenth century, Congress played a dominant role, often with presidential acquiescence. The twentieth century has seen cycles of more active executive leadership interspersed with periods of congressional ascendancy. *Id.* at 49-50; B. KARL, *EXECUTIVE REORGANIZATION AND THE NEW DEAL* 30-31, 34-35, 166-68, 186-87 (1963); H. LASKI, *THE AMERICAN PRESIDENCY* 127-37 (1940). The balance began moving toward the White House under Theodore Roosevelt and Woodrow Wilson, who as a young academic had despaired of the possibility of a strong executive under the political conditions of the time. *See* W. WILSON, *CONGRESSIONAL GOVERNMENT* (1885). Wilson was succeeded by weaker Presidents until Franklin D. Roosevelt seemingly altered the congressional-executive balance permanently. The perceived excesses of subsequent Presidents, particularly Lyndon Johnson and Richard Nixon, in turn gave rise to fears of executive domination. Indeed, some of the most vocal critics of executive power earlier had been celebrants of the rise of the presidency at the expense of Congress. *See, e.g.,* A. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (1973). The difficulties of Gerald Ford and Jimmy Carter, by contrast, prompted many observers to wonder whether the institution of the presidency had become too weak, a concern that has been much subordinated by the apparent success of Ronald Reagan. *See, e.g.,* Greenstein, *The Need for an Early Appraisal of the Reagan Presidency*, in *THE REAGAN PRESIDENCY* 1, 6-7 (F. Greenstein ed. 1983); Reeves, *The Ideological Election*, *N.Y. Times*, Feb. 19, 1984, § 6 (Magazine), at 26, 29. *But see* Lowi, *Ronald Reagan—Revolutionary?*, in *THE REAGAN PRESIDENCY AND THE GOVERNING OF AMERICA* 29, 47-48 (L. Salamon & M. Lund eds. 1985).

conflicts arise from both political and institutional sources. At the political level, Congress represents "the people," in whose name the Constitution was established.² Only the President, however, has a truly national constituency. Thus, conflict based upon different political perspectives is almost inevitable.

A more fundamental institutional aspect of the problem arises directly from the Constitution. That charter provided for a government of separated powers assigned respectively to legislative, executive, and judicial branches.³ In addition, it established a complex set of checks and balances to structure the relationships between and among those three branches. In short, the Constitution "created a government of separated institutions *sharing* powers."⁴ These relationships provide ample opportunity for disagreement.

Examples of the interactions of the three branches abound. Congress has the power to legislate, but bills embodying the results of its deliberations must be presented to the President for approval before becoming law; in the absence of such approval, the congressional decision still may prevail if both houses vote by a supermajority to override the executive's veto.⁵ Similarly, the President is Commander-in-Chief of the armed forces,⁶ but only Congress may declare war.⁷ The President may make treaties, but only with the advice and consent of a supermajority of the Senate.⁸ The President also appoints officers of the United States, but the Senate once again must give its advice and consent.⁹ And while Congress may fix the date on which it convenes,¹⁰ determine the qualifications of its members,¹¹ and

² For a recent analysis of the meaning of the phrase "We the People," see Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1017-18, 1023-43 (1984).

³ U.S. CONST. art. I, § 1 (legislative); art. II, § 1, cl. 1 (executive); art. III, § 1 (judicial).

⁴ R. NEUSTADT, *PRESIDENTIAL POWER* 26 (rev. ed. 1980) (emphasis in original) (footnote omitted).

⁵ U.S. CONST. art. I, § 7, cl. 2.

⁶ *Id.* art. II, § 2, cl. 1.

⁷ *Id.* art. I, § 8, cl. 11.

⁸ *Id.* art. II, § 2, cl. 2.

⁹ *Id.*

¹⁰ *Id.* art. I, § 4, cl. 2.

¹¹ *Id.* § 5, cl. 1.

adopt rules of procedure,¹² the President may call the legislative branch into special session and resolve disagreements concerning the time of adjournment.¹³

Many of the struggles between Congress and the President have concerned money. Among them have been the bitter nineteenth-century debates over federal funding of internal improve-

¹² *Id.* cl. 2. *But cf.* *Powell v. McCormack*, 395 U.S. 486 (1969) (overturning House of Representatives' decision to exclude one of its members).

¹³ U.S. CONST. art. II, § 3.

The judiciary has an analogous symbiotic relationship with the political branches. The lower federal courts were "ordain[ed] and establish[ed]" by legislation passed by Congress and approved by the President, *id.* art. III, § 1, and all article III judges are appointed by the President with the advice and consent of the Senate, *id.* art. II, § 2, cl. 2. Moreover, Congress retains the power to limit the jurisdiction of the courts. *Id.* art. III, § 2, cl. 2.

The checks and balances involving the judiciary have also led to periodic conflicts with the political branches. Perhaps the most famous early dispute concerned the efforts of President Jefferson and his supporters to prevent the Supreme Court from deciding the politically charged case of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). *See infra* notes 76-84 and accompanying text.

The exceptions clause of article III, § 2, together with Congress' inherent power to limit the jurisdiction of the lower federal courts by virtue of its power to create those bodies in the first instance, *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850), has led to numerous legislative efforts to restrict or eliminate the jurisdiction of the federal courts. *See G. GUNTHER, CONSTITUTIONAL LAW 47-48* (11th ed. 1985). The precise contours of congressional powers to establish exceptions to the jurisdiction of article III tribunals and to abolish the lower federal courts that have been created are matters of some scholarly controversy. *See, e.g., Eisenberg, Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498 (1974); Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953); Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900 (1982); Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981).

Other conflicts have involved the executive branch. One notorious instance was President Franklin D. Roosevelt's so-called Court-packing proposal, designed to circumvent judicial hostility to the New Deal. Perhaps the most famous recent example arose during the Watergate affair, when President Nixon implied that he might disregard a Supreme Court ruling enforcing a subpoena issued by the Special Prosecutor unless the decision was "definitive." *See E. DREW, WASHINGTON JOURNAL* 5, 45, 283, 304-05, 328 (1975). In an even more contemporary situation, Attorney General Edwin Meese suggested that the executive branch might not deem itself bound by a lower court's constitutional ruling. *Ameron, Inc. v. U.S. Army Corps of Eng'rs*, 787 F.2d 875, 839-90 (3d Cir.), *on reh'g*, 809 F.2d 979, 991-92 n.8 (3d Cir. 1986), *reh'g en banc denied*, Nos. 85-5226 & 85-5377 (3d Cir. Feb. 27, 1987); Waas & Toobin, *Meese's Power Grab*, NEW REPUBLIC, May 19, 1986, at 15.

ments and the more recent "guns or butter" controversy that emerged simultaneously with increased American military involvement in Southeast Asia two decades ago. These conflicts are perfectly understandable because the purposes and amount of government expenditure suggest who has prevailed in the debate over national policy.¹⁴

Other struggles have involved personnel, specifically control over the removal of nonelected officials. This, too, is unsurprising, for if "the power to tax involves the power to destroy,"¹⁵ the power to remove an official would seem to implicate the power to control that official's actions.¹⁶ The debate over this question erupted in the First Congress, was left unresolved in *Marbury v. Madison*,¹⁷ reached a rancorous crescendo in the dispute over the Tenure of Office Act during Reconstruction, and has recurred at frequent intervals ever since.¹⁸ In this century, the Supreme Court has attempted to impose a constitutional framework upon the debate. The first decision which sought to establish this framework, *Myers v. United States*,¹⁹ held that Congress could not play any formal role in the discharge of federal officers. The second, *Humphrey's Executor v. United States*,²⁰ restricted the *Myers* principle to "purely executive" officials and allowed Congress to prescribe statutory grounds for removal of "independent" officers.

Most recently, the subjects of money and removal converged in *Bowsher v. Synar*.²¹ In that case, on the final day of his final Term on the bench, Chief Justice Burger delivered an opinion invalidating the central feature of the Balanced Budget and Emergency Deficit Control Act of 1985, better known as the

¹⁴ See A. WILDAVSKY, *THE POLITICS OF THE BUDGETARY PROCESS* 4 (1964).

¹⁵ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819). *But cf.* *Panhandle Oil Co. v. Knox*, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting) ("The power to tax is not the power to destroy while this Court sits.").

¹⁶ See R. CUSHMAN, *THE INDEPENDENT REGULATORY COMMISSIONS* 454 (1941); Burkoff, *Appointment and Removal Under the Federal Constitution: The Impact of Buckley v. Valeo*, 22 WAYNE L. REV. 1335, 1335 (1976).

¹⁷ 5 U.S. (1 Cranch) 137 (1803). See *infra* notes 76-84 and accompanying text.

¹⁸ See *infra* Parts II-IV.

¹⁹ 272 U.S. 52 (1926). See *infra* Part III.A.

²⁰ 295 U.S. 602 (1935). See *infra* Part III.B.

²¹ 106 S. Ct. 3181 (1986), *aff'g* *Synar v. United States*, 626 F. Supp. 1374 (D.D.C. 1986) (3-judge court).

Gramm-Rudman-Hollings Act.²² The ruling rested on the placement of control over the deficit-reduction process in the hands of the Comptroller General. A previously enacted federal statute had given Congress, rather than the President, authority to initiate the process of removing the Comptroller and, in some circumstances, permitted the legislative branch to fire that official over the express objection of the President. On the basis of *Myers* and *Humphrey's Executor*, the Chief Justice held that the intrusive congressional role in the procedure for removing the Comptroller General precluded that official from exercising the powers which Gramm-Rudman-Hollings conferred upon him.

This Article suggests that the significance of the conflict between Congress and the President over the removal power has been greatly exaggerated. The Constitution is silent on the question of removal. The textual provision dealing with appointments, from which one might reason by analogy, lends support to two contradictory interpretations: first, that removal is an exclusively presidential prerogative, subject perhaps to statutory for-cause requirements; and second, that removal is a function which the chief executive and the Senate share. On practical and historical grounds, however, the former view has prevailed. At the same time, a broad array of checks and balances makes it very costly for the President to dismiss any official. Moreover, Congress retains a sizeable arsenal of weapons by which it may exercise more effective control over official conduct than is realistically afforded by the threat of removal. Thus, the formal power to remove cannot serve as a satisfactory operational definition of the power to control official conduct.

This analysis has implications for the larger debate between formalists and checks-and-balances advocates that has pervaded discussions of the relationships among the branches since the eighteenth century. Formalists favor maximum feasible independence for each branch in performing its assigned functions;²³ checks-and-balances advocates emphasize the essential interdependence of the branches.²⁴ The present discussion underscores

²² Pub. L. No. 99-177, tit. II, 99 Stat. 1063 (codified at 2 U.S.C. §§ 901-907, 921-922 (Supp. III 1985)).

²³ See, e.g., M. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 13-18 (1967).

²⁴ See, e.g., J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 275-314 (1980).

the limited significance of *any* rule allocating authority with respect to removals and urges a focus upon more meaningful devices to protect the integrity of our political system.

Accordingly, this Article further suggests that the Court's reasoning in *Bowsher* follows logically from *Myers* and *Humphrey's Executor* and is consistent with the formalistic approach adopted in other recent separation-of-powers cases. In a larger sense, however, this formalistic reasoning overlooks the countervailing factors which make the removal of the Comptroller General exceedingly unlikely and obscures the fundamental constitutional question raised by the Gramm-Rudman-Hollings mechanism. That question involves the ability of elected officials to make the most basic political judgments concerning the size and shape of the federal government.

Part I of this Article describes the factual setting of the *Bowsher* litigation. Part II reviews the legal developments relating to the power to remove federal officials from the First Congress until the beginning of the twentieth century. Part III critically analyzes *Myers*, *Humphrey's Executor*, and the Court's one other modern pre-*Bowsher* decision on removal, with particular emphasis upon the historical and political context of each case. Part IV critically analyzes the *Bowsher* decision. That section also examines the meaning of the term "independence" as applied to administrative agencies in order to assess the executive branch's far-reaching assertion that the Constitution gives the President absolute power to remove any nonjudicial officer whom he appoints. Finally, Part V suggests an alternative basis for the *Bowsher* decision, one that focuses upon the concept of political responsibility for setting government policy, and explores some of the implications of the theory that Congress may not delegate its ultimate power to make basic budgetary judgments.

I. THE CASE

A. *The Gramm-Rudman-Hollings Act*

For the past generation, the federal government regularly has spent more money than it has received.²⁵ This deficit has been

²⁵ The federal government operated at a deficit in 30 of the 35 years preceding the

an important political issue; both Jimmy Carter in 1976 and Ronald Reagan in 1980 pledged to balance the budget within four years, but neither succeeded. By 1985, there was widespread agreement that the magnitude of the deficit had become a significant problem.²⁶ Moreover, the situation seemed to be deteriorating: although Congress had reformed its budgeting procedures in the wake of protracted disputes with President Nixon,²⁷ the annual deficit had increased rapidly during the first part of the decade and seemed likely to remain at unprecedented levels for the foreseeable future.²⁸

Faced with this prospect, Congress passed the Gramm-Rudman-Hollings Act.²⁹ The Act proposed a phased elimination of the annual budget shortfall by establishing progressively lower maximum deficit amounts, culminating in a balanced budget by fiscal year 1991.³⁰ It did so by imposing automatic, across-the-

adoption of Gramm-Rudman-Hollings. Peterson, *The New Politics of Deficits*, in *THE NEW DIRECTION IN AMERICAN POLITICS* 365, 367-70 (J. Chubb & P. Peterson eds. 1985).

²⁶ Elliott, *Constitutional Conventions and the Deficit*, 1985 DUKE L.J. 1077, 1080 n.11.

²⁷ Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (codified as amended in scattered sections of 2 U.S.C. (1982 & Supp. III 1985)). See generally Mikva & Hertz, *Impoundment of Funds—The Courts, The Congress and The President: A Constitutional Triangle*, 69 NW. U.L. REV. 335 (1974).

²⁸ Between 1981 and 1985, "the annual deficit has grown from \$59 billion to \$220 billion . . ." 131 CONG. REC. H9613 (daily ed. Nov. 1, 1985) (remarks of Rep. Andrews). One official estimate projected that, under plausible budgetary and economic assumptions, the national debt would more than double to \$2.8 trillion between 1985 and 1990. CONGRESSIONAL BUDGET OFFICE, *THE ECONOMIC AND BUDGET OUTLOOK: FISCAL YEARS 1987-1991: A REPORT TO THE SENATE AND HOUSE COMMITTEES ON THE BUDGET* (pt. 1) xxiii (1986).

²⁹ The original version of this legislation was introduced in the Senate on September 25, 1985, as a rider to a resolution to increase the national debt limit. That version had not been printed when debate began nor had any committee considered it before it was presented. The early floor debate generated numerous questions that led the sponsors to make extensive changes in their proposal. See Drew, *A Reporter in Washington*, THE NEW YORKER, Nov. 4, 1985, at 131. Although these truncated procedures generated criticism in the Senate, see *id.* at 140-42, they do not appear to have affected the Court's view of the case. Cf. *INS v. Chadha*, 462 U.S. 919, 926-27 (1983) (noting that consideration of the legislative veto resolution at issue had been deferred virtually to the last possible day and that the resolution had not been printed at the time it was adopted); Nagel, *The Legislative Veto, the Constitution, and the Courts*, 3 CONST. COMM. 61, 71-72 (1986) (suggesting that the emphasis upon these facts in the Court's opinion reflected a more general judicial hostility to the legislative process).

³⁰ 2 U.S.C. § 622(f) (Supp. III 1985). The annual deficit limits are fixed as follows:

board spending cuts if the projected deficit exceeded the maximum deficit amount for the year. The cuts would become effective without any separate congressional or presidential action. Mandatory expenditure reductions could be avoided only through legislation embodying some alternative way of reducing the deficit to the statutory limit.³¹

The Gramm-Rudman-Hollings process begins with the information available on August 15.³² By August 20, the Directors of the Office of Management and Budget and of the Congressional Budget Office are required to estimate the deficit for the fiscal year starting on October 1 and to report their projections to the Comptroller General.³³ If the projected deficit exceeds the statutory limit,³⁴ the Directors are to calculate, on a program-by-program basis, uniform percentage expenditure reductions to meet the target.³⁵ Half of the reductions are to be allocated to defense programs and half to nondefense programs, subject to specified exceptions and limitations.³⁶ If the Directors are unable to agree upon any item in their report, they must average their differences; their report to the Comptroller General, however, must include both the averaged measure and the divergent figures that gave rise to the disagreement.³⁷

<i>Fiscal Year Ending September 30</i>	<i>Maximum Deficit Amount</i>
1986	\$171.9 billion
1987	\$144.0 billion
1988	\$108.0 billion
1989	\$72.0 billion
1990	\$36.0 billion
1991	0

³¹ The automatic spending reduction mechanism is suspended during periods of actual or projected recession. *Id.* § 904(a).

³² The actual process by which Congress adopts a budget begins much earlier in the year. The schedule for the entire legislative budget process is contained in the Congressional Budget Act.

³³ *Id.* § 901(a)(1). Since the 1986 fiscal year had already begun when the legislation was enacted, the reporting date for that year was January 15.

³⁴ *Id.* In fiscal years 1986 and 1991, the Act is triggered if the projected deficit exceeds the maximum deficit amount. In the intervening fiscal years, the Act is triggered only if the projected deficit exceeds the maximum deficit amount by at least \$10 billion.

³⁵ *Id.* § 901(a)(2).

³⁶ The exceptions and limitations are contained in *id.* §§ 905-907. The most prominent programs exempted from reduction under the Act are Social Security and veterans' benefits.

³⁷ *Id.* § 901(a)(5).

By August 25, the Comptroller General must make his own projections, based upon the submissions by the OMB and CBO Directors, of the deficit and of the program-by-program reductions needed to comply with the Act, and to report his findings to Congress and the President.³⁸ If the Comptroller General determines that the expenditure-reduction mechanism has been triggered, the President is obligated to issue a "sequestration" order by September 1.³⁹ In issuing that order, the President is legally bound by the Comptroller General's determinations and must order spending cuts in strict accordance with those determinations.⁴⁰ The President simultaneously must transmit a message to Congress explaining the sequestration order in detail.⁴¹

After the beginning of the fiscal year on October 1, the Directors of OMB and CBO reassess their projections in light of any newly available information. Their revised report is to be prepared under the same ground rules as their preliminary one and must be delivered to the Comptroller General by October 5. On October 10, the Comptroller is to submit a revised report to the President.⁴² On October 15, the President issues a final

Congress intended that the Directors of OMB and CBO independently estimate the deficit and any necessary spending reductions, then attempt to resolve possible differences by mutual consultation. They are to resort to averaging only if they cannot reach agreement. H.R. CONF. REP. NO. 433, 99th Cong., 1st Sess. 73-74, *reprinted in* 1985 U.S. CODE CONG. & AD. NEWS 988, 990-91.

³⁸ 2 U.S.C. § 901(b)(1) (Supp. III 1985). The Comptroller General is required to act "with due regard for the data, assumptions, and methodologies" used by OMB and CBO and is to prepare his own report "based on the estimates, determinations, and specifications" of those agencies.

³⁹ *Id.* § 902(a)(1).

⁴⁰ The section governing the contents of sequestration orders, provides in relevant part:

The order must provide for reductions in the manner specified in [this Act], must incorporate the provisions of the [Comptroller General's] report . . . and must be consistent with such report in all respects. The President may not modify or recalculate any of the estimates, determinations, specifications, bases, amounts, or percentages set forth in [that] report . . . in determining the reductions to be specified in the order

Id. § 902(a)(3).

⁴¹ *Id.* § 902(a)(5). In this message the President may also propose alternative ways of reaching the deficit limit. *Id.* § 902(c). Unless Congress formally approves such an alternative, however, the sequestration order takes effect automatically.

⁴² *Id.* § 901(c). These revised estimates must utilize the same assumptions, methodologies, and criteria as the preliminary reports.

sequestration order. Once more, the Comptroller General's determinations legally bind the President.⁴³

The Act authorized expedited judicial review.⁴⁴ It also contained a so-called fallback clause that would take effect if any aspect of the automatic deficit-reduction mechanism were invalidated. If that clause were to be triggered, a joint congressional committee composed of the members of the budget committees of each chamber would receive the reports from the Directors of OMB and CBO and prepare a joint resolution that is considered under special procedural rules. If the resolution becomes effective, either through presidential approval or congressional override of an executive veto, it would serve as the basis for a sequestration order.⁴⁵

B. The Litigation

A dozen congressional opponents and the National Treasury Employees Union promptly filed suit challenging the constitutionality of the legislation.⁴⁶ They asserted two basic theories. First, the automatic deficit-reduction mechanism unconstitutionally delegated legislative power to the President and the other officials who were assigned duties under the statute. Second, the powers assigned to the Comptroller General and the Director of the CBO, positions characterized as part of the legislative branch, must be exercised by executive branch personnel.⁴⁷ The Department of Justice strongly defended against the delegation chal-

⁴³ *Id.* § 902(b). The President may also propose alternatives to the final sequestration order for congressional consideration. Again, however, the sequestration order becomes effective unless the legislative branch formally approves an alternative proposal. *See supra* note 41.

⁴⁴ *Id.* § 922. This section provided for initial hearing of any constitutional challenges by a three-judge panel of the United States District Court for the District of Columbia and for direct appeal to the Supreme Court.

⁴⁵ *Id.* § 922(f).

⁴⁶ The plaintiffs asserted standing under provisions authorizing any member of Congress "or any other person adversely affected by any action taken under this [Act]" to file a constitutional challenge. *Id.* § 922(a). The union alleged that the suspension of cost-of-living adjustments to which its retired federal employee members otherwise would have been entitled satisfied the statutory standing requirement.

⁴⁷ 626 F. Supp. at 1378. These suits were filed separately but consolidated by the district court. After the consolidation order was issued, the Senate, the House, and the Comptroller General intervened to defend the Act.

lenge but vigorously attacked the assignment of the power to implement the Act to officials not removable at the will of the President.⁴⁸

In a *per curiam* opinion, a special three-judge court rejected the delegation claim but invalidated the automatic deficit-reduction mechanism because of the Comptroller General's central role. Reviewing the delegation claim "on the basis of the deferential post-*Schechter* cases decided by the Supreme Court,"⁴⁹ the panel found that Gramm-Rudman-Hollings contained adequate standards for the Directors of OMB and CBO and the Comptroller General to exercise their duties.⁵⁰ It found these standards in "the totality of the Act's . . . definitions, context,

⁴⁸ *Id.* at 1379, 1391.

⁴⁹ *Id.* at 1384. The reference in the quotation is to *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

⁵⁰ *Id.* at 1387-89.

The district court further held that the preclusion of judicial review of the economic data, assumptions, and methods that form the basis of the Comptroller General's report did not vitiate the delegation. *Id.* at 1389-90. At least one of the cases relied upon in support of this conclusion is not entirely on point. In *Southern Ry. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 454-64 (1979), the Supreme Court found unreviewable the refusal of the Interstate Commerce Commission to suspend or investigate a proposed general increase in rail freight rates. The Court reasoned that it would be inappropriate to permit a single aggrieved party to delay an across-the-board general increase because of dissatisfaction with a particular rate since the unhappy shipper could contest that rate in a separate administrative proceeding that was itself subject to judicial review. Under Gramm-Rudman-Hollings, by contrast, judicial review of certain issues is absolutely barred.

The other case the district court relied upon also is arguably distinguishable. In *Thompson v. Clark*, 741 F.2d 401, 404-05 (D.C. Cir. 1984), the court held that the question of agency compliance with the Regulatory Flexibility Act, 5 U.S.C. §§ 601-612 (1982), was not reviewable. The court reached that conclusion, however, on the basis of a statutory provision that made the agency's analysis under the Act a part of the record in any judicial challenge to the validity of an administrative rule. By contrast, no provision of Gramm-Rudman-Hollings specifically incorporates the economic data, assumptions, and methods underlying a sequestration order into the record on judicial review.

It appears that any challenge to a sequestration order would focus only upon compliance with the procedures set out in the statute and upon whether the required calculations had been made, not upon the accuracy or reasonableness of the bases for those calculations. In light of the exceedingly short time period within which the calculations are to be made, however, it seems likely that Congress reasoned that judicial challenges to the data, assumptions, and methods would frustrate the purposes of the Act and that courts in any event would not be able to resolve the arcane questions that might be raised in litigation over such questions.

and reference to past administrative practice.”⁵¹ The Comptroller General could not perform the tasks entrusted to him under the Act, however, because the procedure for removing him from office was unconstitutional.⁵²

On direct appeal, the Supreme Court affirmed on separation-of-powers grounds.⁵³ Chief Justice Burger’s majority opinion invalidated the automatic expenditure-reduction mechanism based upon the following argument: (1) an officer controlled by Congress may not constitutionally exercise executive power; (2) Gramm-Rudman-Hollings vests the Comptroller General with executive power; (3) the Comptroller General is removable by Congress; (4) this arrangement renders the Comptroller General subservient to the legislative branch; therefore (5) the Comptroller General may not perform the functions which the Act assigned to him.⁵⁴

⁵¹ 626 F. Supp. at 1389.

The district court also rejected a claim that the powers at issue were nondelegable *per se*. *Id.* at 1385-87. For further discussion of this question, see *infra* Part V.

⁵² 626 F. Supp. at 1394-403.

The district court rejected the argument that this aspect of the case was not ripe for determination because there had been no attempt to remove the Comptroller General. The court reasoned that this particular challenge rested upon the proposition that the very existence of the removal provision would have an immediate impact upon the Comptroller’s performance of his duties. Accordingly, it was appropriate to resolve the merits of this constitutional question at this time. *Id.* at 1392-93.

⁵³ At the threshold, the Court held that at least the individual member of the NTEU, who had been added as a plaintiff, 106 S. Ct. at 3185 n.2, had standing. Accordingly, it avoided a decision on the standing of either the congressional plaintiffs or the union. *Id.* at 3186. The issue of the standing of members of Congress has been a matter of some controversy, as the district court noted. 626 F. Supp. at 1381 n.7; see generally McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241 (1981). The Supreme Court recently dismissed as moot a case in which the question of congressional standing had been squarely presented. *Burke v. Barnes*, 107 S. Ct. 734 (1987). The union appears to have standing to represent its members, provided the members as individuals would have standing. See, e.g., *Warth v. Seldin*, 422 U.S. 490, 511 (1975); *United States v. SCRAP*, 412 U.S. 669 (1973).

The Court also agreed with the district court that the case was ripe. The justices reasoned that the existence of the removal provision, although so far unused, would have immediate effects upon the Comptroller General’s performance of his duties under the statute. 106 S. Ct. at 3189 n.5.

⁵⁴ Justices Brennan, Powell, Rehnquist, and O’Connor joined the Chief Justice’s opinion. Justice Stevens, joined by Justice Marshall, concurred in the judgment. Justices White and Blackmun dissented.

The majority did not address the merits of the delegation claim. 106 S. Ct. at 3193

The Court's analysis has a surface plausibility. The major premise, that Congress may not exercise dominance over executive officials, is unexceptionable. The Court's conclusion follows from all of the intermediate premises. But one need not apply the "close scrutiny"⁵⁵ that the Chief Justice invokes to see that the conclusion is far less obvious than the opinion implies. It is not wholly clear that the Comptroller General exercises executive power or that he is subservient to Congress. Even if all of these propositions are formally correct, however, they are a flimsy reed for the conclusion that they must support. To understand why, it is necessary to appreciate the shifting grounds of political conflict over the removal power. The seeds of that conflict were planted in the Constitution itself.

II. EARLY STRUGGLES OVER THE REMOVAL POWER

A. *The Constitutional Text*

The Constitution says very little about the removal of federal officials. The only explicit provision on the subject states that "[t]he President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."⁵⁶ This language, read literally as part of a document that says nothing else about the matter, might imply

n.10. The dissenters endorsed the district court's analysis rejecting the delegation challenge. *Id.* at 3208 n.5 (White, J., dissenting); *id.* at 3215 n.1 (Blackmun, J., dissenting). The concurring opinion adopts a type of delegation analysis, focusing upon the relationship of the delegate to the legislative branch rather than upon the absence of appropriate standards in the delegation itself. *Id.* at 3196-99, 3202-05 (Stevens, J., concurring in the judgment). None of the parties framed the issue in precisely these terms, however.

⁵⁵ *Id.* at 3189.

⁵⁶ U.S. CONST. art. II, § 4.

In addition to this solitary substantive point, the Constitution contains two sections that deal with the procedural aspects of the subject. The House of Representatives, which "shall have the sole Power of Impeachment," *id.* art. I, § 2, cl. 5, may initiate the process of ousting civil officers. The Senate may remove upon a supermajority vote by virtue of its possession of "the sole Power to try all Impeachments. . . . [But] no Person shall be convicted without the Concurrence of two thirds of the Members present." *Id.* § 3, cl. 6.

that civil officers may be removed only through the impeachment process.⁵⁷

By contrast, the power of appointment is dealt with in greater detail. In general, the President nominates and the Senate confirms federal officers; exceptions to this procedure are permitted, however, for inferior officers. The appointments clause provides:

[The President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.⁵⁸

This seemingly clear provision, however, contains an important ambiguity. While it says that Senate confirmation is generally required for the appointment of federal officers, it does not clearly define "appointment." The language of the clause lends itself to two possible interpretations. First, because the President merely nominates but the Senate must consent, the appointment power may be shared. Second, because the clause permits the Senate simply to obstruct but not actually to nominate federal officers, it may vest the entire appointment power in the President, subject only to senatorial veto.⁵⁹

Resolution of this interpretive question is important. Assuming that civil officers may be discharged by means other than impeachment, the removal power might be seen as incident to the appointment power. If the appointment power is shared, the Senate has a right to participate in, although perhaps not to

⁵⁷ L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 186 n.2 (1978).

⁵⁸ U.S. CONST. art. II, § 2, cl. 2.

⁵⁹ The appointments clause contains another important ambiguity. It does not define the "inferior Officers" whose selection Congress may vest "in the President alone, in the Courts of Law, or in the Heads of Departments." The Supreme Court avoided a definitive resolution of that question until recently. *See Buckley v. Valeo*, 424 U.S. 1, 120-41 (1976) (per curiam); *see generally* C. MORGANSTON, *THE APPOINTING AND REMOVAL POWER OF THE PRESIDENT OF THE UNITED STATES* 4-14, 64-121 (1929, reprint 1976); Burkoff, *supra* note 16, at 1336-79.

initiate, removals. If this power is not shared, the President has the sole authority to remove. Even if the latter is the proper interpretation, however, it leaves open the question whether Congress may limit the President's discretion in exercising the removal power.

Despite the Constitution's silence on the point, Alexander Hamilton argued that the Senate would have to approve the dismissal of any official whose appointment it had confirmed. In *The Federalist No. 77*, Hamilton explained that, just as the upper chamber's role in the appointment process would promote governmental stability, senatorial advice and consent for removals would prevent wholesale purges upon a change in the presidency. Both the possibility of Senate rejection and the opprobrium that might follow from even a successful attempt to replace federal officers would discourage the establishment of a spoils system.⁶⁰ However accurately this view might have reflected the framers' intentions, it was hardly binding as constitutional interpretation. Barely one year later, the whole question was thrown into the political arena, where it has reappeared sporadically ever since.

B. Historical Practice Before the Twentieth Century

The apparent clarity of the constitutional scheme relating to appointments broke down virtually from the outset of the First Congress. Although the President nominally was to propose appointees, the practice of senatorial courtesy and other informal devices that effectively permitted legislators to dictate personnel selections emerged within weeks of the convening of Congress. Moreover, the Senate rapidly began to assert its powers of advice and consent rather more vigorously than the framers intended, blocking a number of lower-level nominees early in the Washington administration.⁶¹ Thus, the executive's real power with regard to appointments was quickly compromised.

⁶⁰ THE FEDERALIST NO. 77 (A. Hamilton), at 459 (C. Rossiter ed. 1961).

⁶¹ L. FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 37-38 (1985); Burkoff, *supra* note 16, at 1342-43. One higher-level nominee whom the Senate rejected was John Rutledge, President Washington's choice to succeed John Jay as Chief Justice in 1795. See 1 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES 1789-1800, at 94-100 (M. Marcus & J. Perry eds. 1985).

The question whether civil officers could be removed by means other than impeachment also received an early and practical answer. Beginning with President Washington, every chief executive removed at least a few such officials. Once again, informal mechanisms emerged to modify the system that the Constitution arguably established. Only later, however, would serious conflict over the issue erupt between the political branches.⁶²

Formal debate over the removal power took place early in the First Congress.⁶³ The issue was joined in connection with legislation creating the Department of Foreign Affairs, the forerunner of today's Department of State. As initially proposed in the House by James Madison, the department would be headed by a Secretary selected by the President with the advice and consent of the Senate. The Secretary was "to be removable from office by the President of the United States." After extended debate in Committee of the Whole, the House rejected a motion to delete this language.⁶⁴ Three days later, following a week-end recess, the House adopted an amendment providing that the chief clerk of the department should take charge of its records "whenever the [Secretary] shall be removed from office by the President of the United States, or in any other case of vacancy."⁶⁵ Immediately thereafter, the House deleted the clause that declared the Secretary to be removable by the President.⁶⁶ In the Senate, a motion to strike the reference to the President's power to remove the Secretary was defeated by an equal division, with Vice-President John Adams casting the decisive vote.⁶⁷

⁶² *Myers v. United States*, 272 U.S. 52, 250 & n.13 (1926) (Brandeis, J., dissenting).

⁶³ The debate began on May 19, 1789, and continued periodically throughout the summer. The House debates are set out in 1 ANNALS OF CONG. 368-96, 455-585, 590-91, 611-15 (J. Gales ed. 1789). There is no reliable record of the actual debates in the Senate.

The Debate of 1789 has been reviewed in detail by a number of scholars. See, e.g., E. CORWIN, *THE PRESIDENT'S REMOVAL POWER UNDER THE CONSTITUTION* 10-23 (1927); L. FISHER, *supra* note 61, at 61-66; J. HART, *TENURE OF OFFICE UNDER THE CONSTITUTION* 217-21, 239-40 (1930); C. MORGANSTON, *supra* note 59, at 15-38; Burkoff, *supra* note 16, at 1379-83.

⁶⁴ 1 ANNALS OF CONG. 576 (J. Gales ed. 1789).

⁶⁵ *Id.* at 578-80.

⁶⁶ *Id.* at 585.

⁶⁷ *Myers*, 272 U.S. at 115. The Senate considered the matter in secret session.

Thus, the legislation as passed recognized the possibility that the President might remove the head of the department but carefully refrained from stating explicitly that the President could discharge the Secretary.⁶⁸ Representative Benson, who introduced the amendments ultimately adopted, explained that he wanted to make clear that the President's removal power arose directly from the Constitution. The original bill, with its specific provision that the President could remove the Secretary, might implicitly suggest that the removal power arose only by legislative grant.⁶⁹

Precisely what Congress intended by adopting this formulation remains unclear. Nearly a century and a half later, Chief Justice Taft would conclude that the First Congress, a virtual continuation of the Constitutional Convention,⁷⁰ had definitively resolved that the President has unfettered power to remove executive officers.⁷¹ Others who have reviewed the debates find the evidence of congressional intent ambiguous indeed. These observers point out that more than half the members of the House did not speak during the debate and that no reliable record of the Senate deliberations exists. Of those members of the First Congress who did express themselves, only a small minority believed that the Constitution gave the President such an illimitable removal power. At least as many thought that Congress could provide for removal under the necessary and proper clause,⁷² and a substantial minority, including several who had served as delegates to the Constitutional Convention, insisted that the Senate had to consent to removals. Moreover, some important members, Madison among them, appear to have taken arguably inconsistent positions during the many weeks of House consideration of the question.⁷³

There is neither a record of the debate nor complete agreement on the actual tally in the Senate. See *id.* n.*; Burkoff, *supra* note 16, at 1383 n.209.

⁶⁸ Identical language was inserted in the laws creating the Departments of War and the Treasury. Act of Aug. 7, 1789, ch. 7, § 2, 1 Stat. 49, 50 (War Department); Act of Sept. 2, 1789, ch. 12, § 7, 1 Stat. 65, 67 (Treasury Department).

⁶⁹ 1 ANNALS OF CONG. 579 (J. Gales ed. 1789).

⁷⁰ *Myers*, 272 U.S. at 136 (noting that the First Congress "numbered among its leaders those who had been members of the [Constitutional] Convention").

⁷¹ *Id.* at 114.

⁷² U.S. CONST. art. I, § 8, cl. 18.

⁷³ *Myers*, 272 U.S. at 193-99 (McReynolds, J., dissenting); *id.* at 284-86 (Brandeis,

The so-called Decision of 1789 probably turned as much upon the nature of the office as upon generally accepted views about the executive powers vested in the President by article II of the Constitution. The Secretary of Foreign Affairs was, after all, the head of the department responsible for conducting the nation's diplomacy, a field in which the President has always been accorded broad latitude. The Secretary thus was not only a close advisor to, but virtually an agent of, the President.⁷⁴ Coupled with the almost universal awe in which President Washington was held, it is hardly surprising that the First Congress concluded that the Senate need not consent to the removal of the Secretary. Analogous reasoning would explain the adoption of the same formulation concerning the Secretary of War, and probably also the Secretary of the Treasury.⁷⁵ Whatever the

J., dissenting); E. CORWIN, *supra* note 63, at 12-16; J. HART, *supra* note 63, at 217-20, 239-40; Burkoff, *supra* note 16, at 1384.

Madison in particular took a variety of positions during this debate, although it is unquestioned that he consistently favored a strong and unitary executive. At the outset, he opposed deleting the phrase which indicated that the Secretary of Foreign Affairs would be removable by the President. 1 ANNALS OF CONG. 464 (J. Gales ed. 1789). Within a few days, however, he voted with the majority to strike that clause. *Id.* at 585. Moreover, he seconded Representative Benson's successful amendment giving the chief clerk custody of departmental records "whenever the . . . principal officer shall be removed from office by the President of the United States." *Id.* at 578-79. The vote on that proposal immediately preceded the deletion of the clause stating that the President could remove the Secretary.

Thus, it is difficult to conclude that any particular verbal formulation was generally understood to embody a commonly accepted construction of the removal power. Summing up this historical record in *Myers*, Justice McReynolds incredulously concluded:

It is beyond the ordinary imagination to picture forty or fifty capable men, presided over by George Washington, vainly discussing, in the heat of a Philadelphia summer, whether express authority to require opinions in writing should be delegated to a President in whom they had already vested the illimitable executive power [of removal] here claimed.

272 U.S. at 207 (McReynolds, J., dissenting).

⁷⁴ E. CORWIN, *supra* note 63, at 17-18, 22-23; Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 614 (1984).

⁷⁵ The Secretary of the Treasury, of course, has a limited role in foreign affairs. Thus, this consideration is less significant as an explanation for this particular removal provision. Nevertheless, the Secretary is the head of an executive department and as such is directly responsible to the President. This close relationship to the chief executive may suffice to explain why Congress adopted the same removal provision for this position as it did with respect to the others.

An interpretation focusing upon the nature of the office involved, rather than upon

significance of the decision, however, the participants in the debate seem to have considered the question as a matter of first principles. For most of the rest of our history, first principles have occupied a distinctly secondary place to more mundane political considerations.

Scarcely a decade later, the removal question returned to center stage as an integral part of the first true crisis in transition of national power. President John Adams, defeated in the bitter campaign of 1800 by Thomas Jefferson, appointed a large number of Federalists to judicial positions in the waning moments of his administration.⁷⁶ In the crush of business the night before Jefferson's inauguration, the commission of William Marbury, who had been selected to serve as a justice of the peace in the District of Columbia, was not delivered. Jefferson's Secretary of State, James Madison, refused to turn over the commission, thereby preventing Marbury from assuming office. Marbury thereupon sought an original writ of mandamus from the Supreme Court. He argued that President Adams had duly appointed him to serve for five years and that the new administration was seeking in effect to remove him from office prior to the expiration of his term.

The affair was complicated by the central role of John Marshall. As Secretary of State under Adams, he had signed Marbury's undelivered commission. Later, Adams appointed Marshall as Chief Justice. The Jeffersonians, not unreasonably, viewed these events as evidence that the Federalists had no intention of relinquishing power despite their repudiation at the polls. In an effort to prevent what they perceived as a partisan judiciary from frustrating the will of the people, the new Con-

the view that the power to remove is an inherently executive function, receives some support from Madison's argument, a week after the final House decision concerning removal of the Secretary of Foreign Affairs, that the President should not have exclusive power to dismiss the Comptroller of the Treasury. Madison reasoned that the properties of that office "partake of a Judiciary quality as well as Executive; perhaps the latter obtains in the greatest degree." 1 ANNALS OF CONG. 611-12 (J. Gales ed. 1789). The cautious reader, however, may discount the force of this argument because Madison's position did not prevail in the First Congress; the Comptroller of the Treasury, like the Secretary, was removable by the President.

⁷⁶ The election of 1800 also revealed an important flaw in the original procedure for choosing the President. The resulting deadlock, which required 36 ballots in the House of Representatives to resolve, led directly to the passage of the twelfth amendment.

gress passed legislation preventing the Supreme Court from sitting between December 1801 and February 1803. In the end, however, that legislation could not preempt a decision in the politically charged case of *Marbury v. Madison*.⁷⁷

Marshall's decision in *Marbury* is best known, of course, for establishing the power of judicial review. It ultimately concluded that Congress could not, consistent with article III, expand the Supreme Court's original jurisdiction; the provision of the Judiciary Act of 1789⁷⁸ purporting to do so thus was unconstitutional. Since the Court had no power to issue an original writ of mandamus, Marbury could not prevail.⁷⁹

In reaching this conclusion, Marshall addressed two important questions concerning the respective roles of the President and Congress in appointments and removals. First, he noted that, under the Constitution, appointment is a presidential act, "though it can only be performed by and with the advice and consent of the senate."⁸⁰ While this statement is dictum in the context of the case at hand, it suggests that quite early in our political history authoritative support existed for resolving the ambiguities in the appointments clause in favor of the President.⁸¹

Second, and of more immediate relevance, Marshall wrote that Marbury did not serve at the mere whim of the President. Rather, the law creating the position gave Marbury the right to hold his office "for five years, independent of the executive."⁸² Thus, because Adams had made the appointment, Jefferson was powerless to revoke it during Marbury's statutory term. This, too, is dictum in the context of the case. Moreover, entirely apart from its byzantine political background, *Marbury* arose in an unusual factual setting. A justice of the peace is a judicial

⁷⁷ 5 U.S. (1 Cranch) 137 (1803). For further details on the background to this controversy, see 3 A. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 94-97 (1919); 2 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 222-23 (rev. ed. 1937); Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 3-6.

⁷⁸ Ch. 20, § 13, 1 Stat. 73, 80-81.

⁷⁹ 5 U.S. (1 Cranch) at 173-80.

⁸⁰ *Id.* at 155.

⁸¹ *Cf. Myers*, 272 U.S. at 142 (remarking that even a dictum of Chief Justice Marshall "challenges the highest and most respectful consideration").

⁸² 5 U.S. (1 Cranch) at 162.

officer, and in any event the Constitution authorizes Congress to legislate with respect to the District of Columbia.⁸³ Nevertheless, the statement implies that in certain circumstances Congress might restrict the President's right to remove federal officers.⁸⁴ Therefore, the Decision of 1789 may not have conclusively determined that the Constitution gives the President unfettered authority to discharge.

The next great battle over the removal power erupted in 1833. Andrew Jackson had come into office as an outspoken exponent of the spoils system. As such, he dismissed an unprecedented number of government workers, replacing them with his own supporters.⁸⁵ The controversy over Jackson's removal policies came to a head when he directed Secretary of the Treasury William Duane to withdraw all federal funds from the Bank of the United States. The Bank question had been a central issue in American politics for many years,⁸⁶ and Jackson had been a principal opponent of such an institution. Jackson fired Duane for refusing to move the government's money to state banks. During a congressional recess, the President named Roger Taney as acting Secretary of the Treasury; Taney promptly complied with Jackson's order. When the Senate reconvened, it refused to confirm Taney's appointment and passed a resolution censuring President Jackson.⁸⁷ Cooler heads prevailed, and the resolution was rescinded three years later.⁸⁸

In retrospect, all sides seem to have won at least a partial victory: Jackson got the government's money out of the Bank, and the Senate prevented what it viewed as an excessively compliant nominee from taking command over the Treasury. In practical terms, however, the executive came out slightly ahead:

⁸³ U.S. CONST. art. I, § 8, cl. 17.

⁸⁴ Accord E. CORWIN, *supra* note 63, at 27-28.

⁸⁵ In fact, although Jackson terminated more officials than all his predecessors combined, his rhetoric was considerably more sweeping than his actions. Nevertheless, his approach represented a substantial break with tradition. See *Myers*, 272 U.S. at 250-51 n.13, 252 n.16 (Brandeis, J., dissenting); L. FISHER, *supra* note 61, at 67; *Developments in the Law—Public Employment*, 97 HARV. L. REV. 1611, 1624-26 (1984).

⁸⁶ Recall that a state's attempt to impose taxes upon the first Bank precipitated *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

⁸⁷ See L. FISHER, *supra* note 61, at 67-68; J. HART, *supra* note 63, at 223-30; C. MORGANSTON, *supra* note 59, at 48-61; Burkoff, *supra* note 16, at 1386-87.

⁸⁸ 13 CONG. DEB. 379-418, 427-506 (1837).

the President had rid himself of an uncooperative cabinet member, but the Senate found itself unable to reinstate the ousted official. Still, this round in the legal debate over the removal power ended inconclusively.

The continuing friction over removal eventually prompted Congress to legislate on the subject. During the debate generated by the Duane affair, Daniel Webster, Henry Clay, and John Calhoun all urged that removals could be regulated by statute.⁸⁹ In fact, Congress had taken a tentative step in that direction in 1820, when it limited the terms of various appointed officials to four years but provided that they should be removable "at pleasure."⁹⁰ The "pleasure" was generally understood to be the President's.⁹¹

Not until 1863, when the spoils system had been in full operation for a generation, did Congress formally provide for a legislative role in removals. The Currency Act fixed the term of the Comptroller at "five years unless sooner removed by the President, by and with the advice and consent of the Senate."⁹² President Lincoln signed this bill into law without objecting to this clause.⁹³

⁸⁹ See E. CORWIN, *supra* note 63, at 30-31; J. HART, *supra* note 63, at 223-30; C. MORGANSTON, *supra* note 59, at 50-56, 58-59.

⁹⁰ Act of May 15, 1820, ch. 102, § 1, 3 Stat. 582. This statute applied to all federal district attorneys, customs collectors, registers of land offices, and various positions in the military.

Both before and after 1820, Congress also enacted a series of narrower laws relating to inferior civil offices. Some of these provisions fixed the term during which incumbents might retain their positions, while others specified grounds for removal. See generally *Myers*, 272 U.S. at 210-14 (McReynolds, J., dissenting); *id.* at 250-56 (Brandeis, J., dissenting).

⁹¹ Frug, *Does the Constitution Prevent the Discharge of Civil Service Employees?*, 124 U. PA. L. REV. 942, 950 (1976).

⁹² Act of Feb. 25, 1863, ch. 58, § 1, 12 Stat. 665.

⁹³ *Myers*, 272 U.S. at 252 (Brandeis, J., dissenting).

Presidents generally have signed removal statutes which limit their power to discharge federal officers. The significance of this fact is not altogether clear. Presidents often sign legislation containing objectionable features because they believe, on balance, that the positive aspects of the bill outweigh the negative. See, e.g., *INS v. Chadha*, 462 U.S. 919, 942 n.13 (1983); Nathanson, *Separation of Powers and Administrative Law: Delegation, the Legislative Veto, and the "Independent" Agencies*, 75 NW. U.L. REV. 1064, 1089 & n.74 (1981). The Currency Act signed by President Lincoln is an especially apt example of this phenomenon. It was adopted at the height of the Civil War, when there was understandable urgency about the nation's economic affairs.

This provision would be carried over to the Tenure of Office Act,⁹⁴ adopted over President Andrew Johnson's veto at a time of extraordinary conflict over Reconstruction policies. Originally drafted to protect rank-and-file federal workers from a wave of firings in late 1866, the bill was quickly broadened to insulate members of the cabinet, especially Secretary of War Edwin Stanton, from dismissal as well.⁹⁵ The Act assured that cabinet members would hold office during the term of the President who appointed them and for one month afterward unless the Senate ratified their discharge sooner; other civil officers whose appointment required Senate confirmation would retain their positions until that body approved their successors.⁹⁶ Violation of the Act was a high misdemeanor punishable by a fine of not more than \$10,000, imprisonment for not more than five years, or both.⁹⁷

The predictable collision was not long in coming. Johnson promptly removed Stanton from office without Senate approval, a step which precipitated his impeachment. Ten of the eleven counts in the bill of impeachment related to this statutory violation. Johnson was acquitted in the Senate by a one-vote margin, and the entire affair came to be viewed as a national embarrassment.⁹⁸

⁹⁴ Ch. 154, 14 Stat. 430 (1867), *amended by* Act of Apr. 5, 1869, ch. 10, 16 Stat. 6, *repealed by* Act of Mar. 3, 1887, ch. 353, 24 Stat. 500.

⁹⁵ R. BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 260-63, 274-80 (1973); E. MCKITRICK, *ANDREW JOHNSON AND RECONSTRUCTION* 495-97 (1960).

⁹⁶ Section 2 of the Act further provided that, during a recess of the Senate, the President might suspend and designate a temporary successor for any officer who had become incapable of or legally disqualified from performing his duties. Within 20 days after the Senate reconvened, however, the President had to report the fact of and the grounds for removal to that body. Unless the Senate approved the removal, the suspended official would resume his position.

In addition, section 3 limited the President's power to make recess appointments as a device to circumvent Senate hostility to executive policies. This provision allowed the President to fill vacancies that occurred during a congressional recess. If the chief executive failed to send up a nomination during the Senate's next regular session, the position would remain unfilled until that body confirmed an appointee.

⁹⁷ Tenure of Office Act § 6, 14 Stat. 430, 431.

⁹⁸ See generally M. BENEDICT, *THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON* (1973); R. BERGER, *supra* note 95, at 252-96; D. DeWITT, *THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON* (1903); E. MCKITRICK, *supra* note 95, at 486-509; Burkoff, *supra* note 16, at 1388-93.

Congress responded by amending the Tenure of Office Act in the first weeks of the incoming Grant administration. The new version deleted the specific provision applicable to cabinet members and liberalized the procedures for suspensions and recess appointments.⁹⁹ Despite continuing criticism, the Act was not repeated until 1887. The end came during the first Democratic administration in twenty-four years, following a bitter wrangle between President Cleveland and the Senate over the wholesale removal of federal employees.¹⁰⁰

For all the controversy it had generated, the law went out with barely a whimper. The House allocated just half an hour to the issue; the report accompanying the bill had only one substantive paragraph.¹⁰¹ The Senate spent longer on the bill, but only because Senator George Edmunds of Vermont, one of the few remaining members who had served in the Reconstruction Congresses, protested that the Act stood as a bulwark against the abuses of the spoils system.¹⁰² Edmunds' concerns have a curious ring to them; four years earlier Congress had passed the Pendleton Act,¹⁰³ the first comprehensive federal civil service law, in an effort to address that very problem.

Edmunds' narrow perspective during this debate was hardly unique. Not a single member of either chamber pointed out that a separate tenure of office provision applied to postmasters.¹⁰⁴ Nor did anyone remark that, barely a month before, Congress had created the nation's first administrative agency with a pro-

⁹⁹ Act of Apr. 5, 1869, ch. 10, 16 Stat. 6. See L. FISHER, *supra* note 61, at 69; J. HART, *supra* note 63, at 230-33.

¹⁰⁰ See L. FISHER, *supra* note 61, at 70; C. MORGANSTON, *supra* note 59, at 74-80.

¹⁰¹ The entire House consideration of the repeal measure appears at 18 CONG. REC. 2697-700 (1887). The relevant portion of the report states:

The reasons for the . . . recommendation are, that by the repeal of [the Tenure of Office Act], the law will then stand as it stood from the foundation of the Government up to 1867, when, in a time of great party excitement, the said legislation was enacted, which, to say the least, was unusual and tended to embarrass the President in the exercise of his constitutional prerogative.

H.R. REP. NO. 3539, 49th Cong., 2d Sess. 1 (1887).

¹⁰² 18 CONG. REC. 137, 138-40, 141, 211-14 (1886); see also *supra* text accompanying note 95.

¹⁰³ Act of Jan. 16, 1883, ch. 27, 22 Stat. 403.

¹⁰⁴ Act of July 12, 1876, ch. 179, § 6, 19 Stat. 78, 80. See *infra* Part III.A.

vision that its members might be removed only for "inefficiency, neglect of duty, or malfeasance in office."¹⁰⁵ Eventually, however, the Supreme Court would attempt to resolve the long-standing political controversy over removal in cases involving those very provisions.

C. *Judicial Precedents*

Despite the legal questions raised by these episodes, the Supreme Court managed to steer relatively clear of the removal controversy until well into the twentieth century. Although it heard the claims of a number of ousted officials, the Court studiously avoided resolution of the constitutional issues while filling its opinions with dicta. By means of a variety of temporizing devices, almost every challenge was rejected. Over time, however, the Court began to hint that removal might not be an exclusive executive prerogative.

The circumlocutions of Chief Justice Marshall in *Marbury* set the early pattern of judicial treatment of the ultimate constitutional issue.¹⁰⁶ By 1839, in *Ex parte Hennen*,¹⁰⁷ the Court was suggesting that the Decision of 1789 had established that the removal power belonged to the President alone.¹⁰⁸ Yet the facts giving rise to this dictum were considerably more limited. All that *Hennen* actually resolved was that, because the power of removal followed from the power of appointment, a federal district judge who had been authorized to hire a court clerk had a unilateral right to fire the clerk.¹⁰⁹

¹⁰⁵ Interstate Commerce Act, ch. 104, § 11, 24 Stat. 379, 383 (1887) (current version at 49 U.S.C. § 10301(c) (1982)). See *infra* Part III.B. (discussing judicial construction of identical language in another statute).

This provision appears to have attracted virtually no attention during the congressional debates on the creation of the Interstate Commerce Commission. Indeed, the subject of removal is not even mentioned in standard discussions of the legislative history of the Commerce Act. See, e.g., A. & O. HOOGENBOOM, A HISTORY OF THE ICC 13-17 (1976); 1 I. SHARFMAN, THE INTERSTATE COMMERCE COMMISSION 19-35 (1931). To the extent that it had any significance, the language seems to have been intended to assure that objectionable commissioners would be dismissed rather than to assert congressional authority over removals. See R. CUSHMAN, *supra* note 16, at 61-62.

¹⁰⁶ See *supra* notes 80-84 and accompanying text.

¹⁰⁷ 38 U.S. (13 Pet.) 230 (1839).

¹⁰⁸ *Id.* at 259.

¹⁰⁹ *Id.* at 258-59. In this instance the clerk was discharged by the successor of the judge who had appointed him.

For the next half-century, the Court upheld dismissals and suspensions on a variety of theories. Sometimes the justices found a lack of jurisdiction to order the sought-after remedy, which invariably was back pay.¹¹⁰ On other occasions, the Court narrowly construed the statute upon which the suit was based to reject the claim.¹¹¹ Senate confirmation of a successor also was held to defeat any possible relief for ousted officials.¹¹²

The only exception to this pattern was *United States v. Perkins*,¹¹³ which assured the constitutionality of the civil service laws. Significantly, however, that case concerned a dismissal by a department head, not by the President. In *Perkins*, the Court held that, in the absence of a specific statutory provision, the Secretary of the Navy had no inherent authority to discharge a cadet engineer from the service. The engineer, a graduate of the Naval Academy, had been appointed under a statute that appeared to assure him a position for a definite term. The Secretary had discharged him because there were no vacancies at the time.¹¹⁴ The Court reasoned that the engineer held an inferior office, appointments to which had been vested in the Secretary as head of an executive department. The statute vesting the Secretary with authority to appoint did not expressly confer a power to terminate. Accordingly, Congress "may limit and restrict the power of removal as it deems best for the public interest."¹¹⁵ The opinion carefully avoided deciding whether

¹¹⁰ *United States ex rel. Goodrich v. Guthrie*, 58 U.S. (17 How.) 284, 303-05 (1855) (finding no jurisdiction to order payment of back salary to chief justice of Minnesota Territory whom President had removed before end of statutory term).

The dissent in this case made clear that the definition of "appointment" in article II still had not been entirely settled. Despite Chief Justice Marshall's statement in *Marbury* over 50 years earlier, Justice McLean insisted that, "[i]f the power to remove from office be inferred from the power to appoint, both the elements of the appointing power [i.e., nomination by President and confirmation by Senate] are necessarily included." *Id.* at 307 (McLean, J., dissenting).

¹¹¹ *McAllister v. United States*, 141 U.S. 174 (1891) (denying claim for back salary by territorial judge removed before expiration of his term); *Embry v. United States*, 100 U.S. 680, 684-85 (1880) (refusing to award back pay to suspended postmaster because 1869 Tenure of Office Act, under which case arose, permitted denial of salary during periods of suspension).

¹¹² *Mullan v. United States*, 140 U.S. 240, 245-47 (1891); *Blake v. United States*, 103 U.S. 227, 236-37 (1881).

¹¹³ 116 U.S. 483 (1886).

¹¹⁴ *Id.* at 483.

¹¹⁵ *Id.* at 485.

Congress might restrict the President's power to remove officials whom he had appointed with the advice and consent of the Senate.¹¹⁶ Nonetheless, *Perkins* made clear that Congress could create a civil service system simply by vesting the power to appoint federal workers in department heads and limiting, restricting, or regulating removals. Thus, the spoils system could be effectively abolished by statute.

The Court returned to the problem of statutory restrictions on removal in a series of cases around the turn of the century. First, it held that a statute providing a four-year term for United States Attorneys did not prevent the President from dismissing an incumbent during that period; the law in question was designed simply to make explicit that holders of such positions did not have life tenure.¹¹⁷ Next, the Court held that, in the absence of a specific statutory provision, a Department of the Interior clerk could not obtain judicial review of his dismissal for inefficiency.¹¹⁸

A year later, a United States Commissioner was denied back pay after being summarily discharged by the territorial judge who had appointed him. The statute creating the position made the commissioner removable "for causes prescribed by law." Because Congress had failed to prescribe grounds for removal, the judge had unreviewable discretion to terminate the commissioner. The Court cautioned, however, that the case would have been "much different" if Congress had legislated to fill the statutory gap.¹¹⁹

The last of the early cases, *Shurtleff v. United States*,¹²⁰ also upheld a presidential dismissal. The decision is significant because it explicitly recognized the possibility that Congress might restrict the grounds for removal of federal officers to those specified by statute, although the Court did so "for purposes of

¹¹⁶ *Id.* at 484.

¹¹⁷ *Parsons v. United States*, 167 U.S. 324, 338-39, 342-43 (1897).

The political aspects of this case were palpable. Parsons had been appointed by President Benjamin Harrison and was removed by President Cleveland, who had defeated Harrison in the 1892 election.

¹¹⁸ *Keim v. United States*, 177 U.S. 290, 294 (1900).

¹¹⁹ *Reagan v. United States*, 182 U.S. 419, 424-25, 427 (1901).

¹²⁰ 189 U.S. 311 (1903).

this case only.”¹²¹ President McKinley had summarily terminated Shurtleff as a general appraiser of merchandise, although the law under which he had been appointed provided that he could “be removed from office at any time by the President for *inefficiency, neglect of duty, or malfeasance in office.*”¹²² The Court nonetheless upheld the discharge, reasoning that it “would require very clear and explicit language” to assume that Congress had intended to limit the President’s undoubted right to remove, as incident to his power to appoint, and that the statute in question did not satisfy this demanding standard.¹²³

In each of these decisions, the Court carefully hedged so as to avoid resolving the constitutional question. The justices seemed to recognize the intractable political aspects of the removal debate. Thus, at least where the President had made the dismissal personally, the Court consistently declined to intervene. Its opinions implied that Congress might limit the chief executive’s freedom of action, but every statute that might have been so construed was read very narrowly against the terminated official. Even where someone else had taken the challenged action, the Court was reluctant to interfere. Except for finding no constitutional impediment to the creation of the merit system, the justices deemed the matter as one best left to the political branches.

¹²¹ *Id.* at 314.

¹²² Act of June 10, 1890, ch. 407, § 12, 26 Stat. 131, 136 (emphasis added). This language is identical to the grounds for removal set out in the Interstate Commerce Act. See *supra* note 105 and accompanying text.

¹²³ 189 U.S. at 315.

The Court also emphasized that Shurtleff essentially was asserting a right to life tenure because the statute did not fix a definite term of appointment. It was “quite inadmissible” to infer a congressional intent to confer such tenure on so lowly an officer absent “plain and explicit language” to that effect because such a construction would overturn more than 100 years of practice. *Id.* at 316. See *infra* note 195.

This point does not undermine the validity of the civil service laws, however. Unlike civil servants, who as “inferior officers” are appointed by department heads alone, general appraisers such as Shurtleff were appointed by the President with the advice and consent of the Senate. Congress undoubtedly could have vested the appointment of such appraisers in a department head, however. See *supra* notes 113-16 and accompanying text.

III. THE SUPREME COURT'S PROPOSED RESOLUTION

A. *The Myers Decision*

After that extended prologue, the Supreme Court finally attempted to impose order on the conflict between the political branches in 1926. In *Myers v. United States*,¹²⁴ the Court declared unconstitutional a statute that required the advice and consent of the Senate for the removal of most postmasters. Not content to let the matter rest there, the majority, speaking through Chief Justice Taft, gratuitously went on retroactively to invalidate the long-repealed Tenure of Office Act¹²⁵ and to maintain that any limitation upon the President's power to discharge his appointees violated the separation-of-powers doctrine. The extraordinary breadth of Taft's argument prompted three separate dissents.¹²⁶

The "unusual length and elaborateness"¹²⁷ of the opinions should have come as no surprise. Long before the decision was announced, it was clear that *Myers* was a "great case."¹²⁸ It had been argued twice in the Supreme Court; on reargument the Court invited Senator George Wharton Pepper as *amicus curiae*

¹²⁴ 272 U.S. 52 (1926).

¹²⁵ *Id.* at 176. This was not the only time that the Court went out of its way to condemn, as unconstitutional, a discredited but no longer effective statute. In *New York Times Co. v. Sullivan*, 376 U.S. 254, 273-76 (1964), the Court found the Sedition Act of 1798, which had expired by its own terms in 1801, violated the first amendment.

¹²⁶ Justice Holmes found the premises of the opinion "spider's webs inadequate to control the dominant facts." 272 U.S. at 177 (Holmes, J., dissenting). While Holmes managed to compress his unease into three paragraphs, Justice McReynolds delivered a somewhat meandering 62-page critique, *id.* at 178-239 (McReynolds, J., dissenting), and Justice Brandeis devoted 56 pages to tracing virtually the entire history of the removal controversy, particularly as it related to inferior officers, *id.* at 240-95 (Brandeis, J., dissenting).

¹²⁷ Strauss, *supra* note 74, at 610.

¹²⁸ Although *Myers* might support Holmes' famous aphorism that "[g]reat cases like hard cases make bad law," *Northern Sec. Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting), there was no such suggestion in the opinions. Perhaps even the dissenters recognized that if the observation were correct, "the Court must make a lot of bad law." Kalven, *The Supreme Court, 1970 Term—Foreword: Even When a Nation Is at War*, 85 HARV. L. REV. 3, 26 (1971); cf. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 805-07 (1982) (suggesting that the Court is being called upon to decide an increasing number of hard cases).

to present the views of Congress. Despite the retrospective significance of the decision, almost everything about the *Myers* litigation has an air of unreality about it.

Let us begin with the facts.¹²⁹ In 1913, Frank Myers was appointed to a four-year term as postmaster in Portland, Oregon, by President Wilson. Wilson reappointed Myers for a similar term in 1917. In the latter half of 1919, postal inspectors conducted an investigation into possible irregularities in the Portland post office. In January 1920, the Postmaster General demanded that Myers resign. When Myers refused, he was removed from office effective February 1, 1920. Although the correspondence between Myers and officials of the Post Office Department referred to the investigation, no reason was given for the firing.

Assuming that there were grounds to dismiss Myers,¹³⁰ the sacking was handled in a most curious fashion. The statute under which he had been appointed provided:

Postmasters of the first, second and third classes shall be appointed and may be removed by the President by and with

¹²⁹ The facts are summarized in Chief Justice Taft's opinion for the Court. 272 U.S. at 106-07. The transcript of the record (including the Court of Claims decision under review), the briefs on reargument in the Supreme Court, and the various opinions of the justices were later published by the Government Printing Office. *POWER OF THE PRESIDENT TO REMOVE FEDERAL OFFICERS*, S. Doc. No. 174, 69th Cong., 2d Sess. (1926). Except as otherwise indicated, the account of the facts in the text is taken from the latter document. *Id.* at 5-17.

¹³⁰ The nature of the irregularities which prompted the investigation is unclear. I have been unable to locate anything that might shed light on the subject. Neither the record in the case nor anything in the popular or scholarly literature amplifies the circumstances surrounding the investigation. The *New York Times*, which reported the Supreme Court decision on the front page, did not explain why Myers had been fired. The files of the *Portland Oregonian* for the relevant period are in inaccessible storage, so it is impossible to determine what the local press may have reported. Academic historians also appear to have overlooked the *Myers* case. I have found no relevant articles and not a single reference to the affair in any of the numerous biographies of President Wilson that I have consulted.

The letter demanding Myers' resignation referred to the need "to eliminate the antagonism which existed in the Portland post office and bring about needed cooperation." Letter from First Assistant Postmaster General J.C. Koons to F.S. Myers, Jan. 22, 1920, reprinted in S. Doc. No. 174, *supra* note 129, at 7. The implication of an unusual degree of friction between Myers and his subordinates at the Portland post office suggests that he was removed on administrative grounds. In any event, there is no reason to doubt that at least colorable grounds for the action against Myers could have been adduced had the occasion required.

the advice and consent of the Senate, and shall hold their offices for four years unless sooner removed or suspended according to law.¹³¹

Myers was a first-class postmaster. Despite the plain language of the statute, President Wilson declined to seek Senate approval for the ouster of Myers. He also failed to nominate a replacement for Myers until after Congress adjourned six months later.

Precisely why President Wilson proceeded in this fashion remains unclear.¹³² He could have complied with the requirements of the statute by simply nominating a new postmaster for Portland.¹³³ There was no particular reason to believe that the Senate would have rejected such a person, especially if the investigation of Myers had found any substance to the allegations of irregularities in his operation.¹³⁴

¹³¹ Act of July 12, 1876, ch. 179, § 6, 19 Stat. 78, 80-81. This section essentially reenacted a previous requirement of Senate consent to the removal of postmasters that had been adopted four years earlier. Act of June 8, 1872, ch. 335, § 63, 17 Stat. 283, 292-93.

It is not altogether clear why Congress felt it necessary to legislate special protection for postmasters. These officials, after all, were included within the coverage of the Tenure of Office Act. The question takes on special force because postmasters of the first, second, and third classes constituted nearly 90 percent of all presidential appointees as late as 1923. See 272 U.S. at 241 n.3 (Brandeis, J., dissenting). The answer seems to be that these postal statutes were passed to create exceptions to the Tenure of Office Act. The 1872 law created *five* classes of postmasters, while the 1876 law established *four*. Thus, each of these enactments exempted the heads of the smallest post offices from the requirement of Senate consent to removal.

¹³² As indicated earlier, published works covering this period shed no light on this aspect of the affair. See *supra* note 130. Further, nothing in the heretofore published Wilson papers addresses this episode. At this writing, however, this enormous project, directed by Arthur S. Link for the Princeton University Press, has not progressed beyond the end of 1919. Perhaps the unpublished materials contain evidence bearing upon the question.

¹³³ Myers' counsel conceded that point in the Supreme Court. 272 U.S. at 59.

Wilson might have been unwilling to face the prospect that Myers would demand to testify at the confirmation hearing for a successor. Myers in fact had asked the chairman of the Senate Committee on Post Offices and Post Roads to hold a hearing on his case within three weeks of his ouster. S. Doc. No. 174, *supra* note 129, at 8, 15. This problem hardly seems serious, however, particularly if cause existed for Myers' removal.

¹³⁴ It is conceivable that the widespread unhappiness with the aggressive policies and personality of Postmaster General Burleson might have prompted some opposition in the Senate. See W. WELLS, *WILSON THE UNKNOWN* 313 (1931). Although the Republicans held a narrow majority in the upper chamber, it is difficult to assess the likelihood that this opposition would have been more than nominally troublesome.

Two explanations for Wilson's conduct come readily to mind. First, although the President was said to have approved the order to fire Myers, he may not in fact have been familiar with the details of the situation. At the time of Myers' ouster, Wilson had been bedridden for more than four months after suffering a stroke early in the fall of 1919. His physical condition prevented him from performing many of the duties of his office. Therefore, it is entirely possible that Postmaster General Burleson decided to fire Myers and Wilson merely ratified the dismissal *pro forma*.¹³⁵

This hypothesis, however, fails to explain why the administration opted to provoke a constitutional challenge over a minor personnel matter. For that, one must look to the domestic political situation at the time. Wilson had suffered his stroke in the midst of a nationwide speaking tour designed to enlist popular support for the Treaty of Versailles, and especially for the League of Nations Covenant which was its centerpiece, against the "little band of willful men" in the Senate who had been blocking ratification. Wilson regarded the League as the single highest priority for the remainder of his term, an instrument he hoped would render war obsolete and incidentally assure his place in history. The unexpectedly strong opposition to the League threatened his supreme objective. Thus, the Senate's perceived interference with the realization of this cherished dream may have made Wilson especially sensitive to any legislative incursion upon executive powers.¹³⁶

Unfortunately, no hard evidence exists to support this hypothesis. Yet only such an explanation could account for a presidential decision to transform a routine administrative problem into a constitutional confrontation. Moreover, this expla-

¹³⁵ See J. KERNEY, *THE POLITICAL EDUCATION OF WOODROW WILSON* 432-33 (1926); D. LAWRENCE, *THE TRUE STORY OF WOODROW WILSON* 282 (1924); G. VIERECK, *THE STRANGEST FRIENDSHIP IN HISTORY* 320 (1932).

¹³⁶ It was probably only coincidence that one of the Democratic supporters of the Lodge reservations to the Treaty of Versailles was Senator George E. Chamberlain of Oregon. See D. LAWRENCE, *supra* note 135, at 296. While there may have been some satisfaction in getting back at a patronage appointee in the home state of a Senate renegade, it is unlikely that Wilson was involved enough in daily decisionmaking to have considered that fact in approving Myers' ouster. See J. KERNEY, *supra* note 135, at 432-33.

nation would be consistent with Wilson's adamant defense of presidential prerogative that led him to veto the original Budget and Accounting Act in the spring of 1920.¹³⁷ Finally, the escalation of such a trivial incident into a question of high principle might suggest that the decision was made out of petulance or emotional instability, conditions which appear to have characterized much of Wilson's behavior during this period.¹³⁸

Whatever the reason, Myers continually asserted his right to remain in office. Soon after his term expired during the summer of 1921, he filed suit for his unpaid salary. The Court of Claims denied his claim on grounds of laches,¹³⁹ a basis that even the government could not defend.¹⁴⁰ Thus, the constitutional issue was joined.

Chief Justice Taft found support for his view that the President had unfettered power to remove any of his appointees (except article III judges, who are specifically assured life tenure during good behavior) from the Constitution's establishment of a unitary executive and from the President's responsibility under article II to "take Care that the Laws be faithfully executed."¹⁴¹ That responsibility required that the President have subordinates to assist him and that he be able to discharge them whenever he loses confidence in their character or fitness.¹⁴² This was the true import of the debate in the First Congress,¹⁴³ congressional practice down to the Tenure of Office Act suggesting acquiescence in unlimited presidential removal authority,¹⁴⁴ the views of such respected constitutional authorities as Kent, Story, and Webster,¹⁴⁵ and the prior decisions of the Court.¹⁴⁶ The experience

¹³⁷ See *infra* notes 238-42 and accompanying text.

¹³⁸ See, e.g., J. BLUM, *WOODROW WILSON AND THE POLITICS OF MORALITY* 191-95 (1956); D. LAWRENCE, *supra* note 135, at 282.

¹³⁹ *Myers v. United States*, 58 Ct. Cl. 199, 206 (1923), *aff'd on other grounds*, 272 U.S. 52 (1926).

¹⁴⁰ As Chief Justice Taft delicately put it, "[T]he Solicitor General, while not formally confessing error in this respect, conceded at the bar that no laches had been shown." 272 U.S. at 107.

¹⁴¹ U.S. CONST. art. II, § 3.

¹⁴² 272 U.S. at 117.

¹⁴³ *Id.* at 109-36.

¹⁴⁴ *Id.* at 145-48.

¹⁴⁵ *Id.* at 148-52.

¹⁴⁶ *Id.* at 152-58. Taft also invoked several opinions of attorneys general that were consistent with this position.

under the Tenure of Office Act amply confirmed the dangers of allowing legislative encroachment upon presidential prerogatives.¹⁴⁷ In response to Myers' argument that this case concerned an inferior officer, Taft observed that Congress could have vested the appointment in the Postmaster General accompanied by limitations upon grounds for removal; not having done so, however, the legislature had left the President with a free hand to dismiss for any reason or for none.¹⁴⁸

For all its breadth, the opinion seems to have reasoned backward from a radical separation-of-powers perspective. The Chief Justice emphasized that "the reasonable construction of the Constitution must be that the branches should be kept separate in all cases in which they were not expressly blended, and the Constitution should be expounded to blend them no more than it affirmatively requires."¹⁴⁹ For Taft, the heads of departments were virtual surrogates for the President, exercising his judgment and therefore requiring his implicit faith. There was no principled basis for distinguishing these superior officers from their subordinates.¹⁵⁰ Thus, removal was an inherently executive function that could not be shared. He grudgingly conceded that some executive officers might be charged with making quasi-judicial determinations requiring insulation from direct presidential influence or control, but even then the chief executive could "consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised."¹⁵¹

Logical difficulties abound in this opinion. At the most basic level, it offered no support for the proposition that removal is an inherently executive function. Taft curtly dismissed the colonial and early state practice of lodging removals in the legislature or the judiciary as "really vesting part of the executive power in another branch of the Government."¹⁵² This entirely

¹⁴⁷ *Id.* at 164-68.

¹⁴⁸ *Id.* at 163.

¹⁴⁹ *Id.* at 116.

¹⁵⁰ *Id.* at 132-34.

¹⁵¹ *Id.* at 135.

¹⁵² *Id.* at 118.

circular statement thus begged the central question in the case.¹⁵³

Moreover, why anyone would regard an illimitable removal power as a significant presidential prerogative is difficult to understand in light of the ease with which Congress can circumvent it. The opinion made plain that the legislative branch could limit the President's role in, or perhaps even exclude him altogether from, dismissing so-called inferior officers by the simple device of vesting their appointments in the heads of departments.¹⁵⁴ Further, nothing in the Constitution prevents Congress from fixing salaries at levels so low that government officials would resign,¹⁵⁵ or even from abolishing some positions outright.¹⁵⁶ Plainly implied, then, was the dubious proposition that the Constitution itself somehow enshrined the spoils system for every nonjudicial appointive office.¹⁵⁷

Passing these difficulties, however, the evidence supporting Taft's expansive construction of executive power was not persuasive, as the dissenters and the commentators immediately noted.¹⁵⁸ First, the Decision of 1789 did not seem nearly as broad as the Chief Justice painted it.¹⁵⁹ Second, Congress had imposed

¹⁵³ At a logically prior level, the opinion also assumes that the power of appointment is an executive prerogative, limited only by the requirement of the advice and consent of the Senate. The Constitution, however, lends credence to the alternative view that the appointment power is shared. See *supra* notes 58-59 and accompanying text. Nonetheless, a settled practical consensus seems to have arisen in favor of the construction that the Chief Justice endorsed. This judicial construction can be traced at least as far back as *Marbury*. See *supra* notes 80-81 and accompanying text. The last time any member of the Court seriously suggested that the appointment power is shared took place in 1855, see *supra* note 110, perhaps indicating the aptness of Holmes' aphorism that "a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

¹⁵⁴ See *supra* text accompanying note 148.

¹⁵⁵ Only federal judges have constitutional salary protection, and even that provision prevents only reductions in pay. U.S. CONST. art. III, § 1. As the recent concern over judicial compensation suggests, however, simply leaving pay scales unadjusted may discourage some qualified persons from seeking government employment.

¹⁵⁶ See 272 U.S. at 177 (Holmes, J., dissenting).

¹⁵⁷ See Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, LAW & CONTEMP. PROBS., Spring 1976, at 102, 114-15.

¹⁵⁸ Indeed, Professors Corwin and Hart wrote their works specifically to rebut the broad arguments in the *Myers* opinion. See generally E. CORWIN, *supra* note 63; J. HART, *supra* note 63.

¹⁵⁹ See *supra* notes 63-75 and accompanying text.

numerous statutory limitations upon the President's power to remove inferior officers such as postmasters.¹⁶⁰ Third, the constitutional authorities whom Taft invoked did not endorse his far-reaching interpretation of the removal power; Story, in particular, suggested that Congress could require Senate consent for the removal of inferior officers.¹⁶¹ Fourth, the judicial precedents, while upholding each challenged removal by the President, contained language implying that executive authority in this field might not be unlimited.¹⁶² Finally, Taft dismissed Hamilton's argument in *The Federalist No. 77* on the basis of an ambiguous statement made in an entirely different context several years later¹⁶³ and rejected Marshall's *Marbury* opinion as mere dictum,¹⁶⁴ even though this evidence suggested that the original understanding of the removal power was not as clear as the *Myers* majority now claimed.

Most commentators explain the broad sweep of the opinion by Taft's unique status as the only member of the Supreme Court ever to have occupied the White House.¹⁶⁵ Yet this fact raises one last ironic question about the opinion: if the requirement of senatorial consent for the removal of postmasters truly were an intolerable infringement upon executive power, how did Taft himself manage to ignore it during his four years in the presidency? The statute had been on the books for more than forty years when he took office. As President, Taft dismissed scores of postmasters. In each instance he scrupulously complied

¹⁶⁰ See 272 U.S. at 188-92, 209-15 (McReynolds, J., dissenting) (noting that the President lacked authority to appoint, much less to remove, postmasters until 1836); *id.* at 250-56, 259-75 (Brandeis, J., dissenting); J. HART, *supra* note 63, at 230-33.

¹⁶¹ J. STORY, COMMENTARIES ON THE CONSTITUTION § 1544 (1833), *quoted in* 272 U.S. at 240 (Brandeis, J., dissenting). On the other authorities relied upon by Taft, see E. CORWIN, *supra* note 63, at 28-31.

¹⁶² See *supra* notes 117-23 and accompanying text.

¹⁶³ 272 U.S. at 136-39; see E. CORWIN, *supra* note 63, at 25-26.

¹⁶⁴ 272 U.S. at 139-43; see E. CORWIN, *supra* note 63, at 27.

¹⁶⁵ See, e.g., E. CORWIN, *supra* note 63, at 50; Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451, 476 (1979); Burkoff, *supra* note 16, at 1402-04; Donovan & Irvine, *The President's Power to Remove Members of Administrative Agencies*, 21 CORNELL L.Q. 215, 221 (1936); Leuchtenburg, *The Case of the Contentious Commissioner: Humphreys' [sic] Executor v. U.S.*, in FREEDOM AND REFORM 276, 292 (H. Hyman & L. Levy eds. 1967); Strauss, *supra* note 74, at 610.

with the law that he found so obnoxious in *Myers*.¹⁶⁶ He never questioned the constitutionality of the statute, even when the Senate blocked the removal of some postmasters.¹⁶⁷ The events in *Myers* suggest that he easily could have created a test case had he been so inclined.

This question takes on added force when one considers that Taft thought that the President should not even have to bother appointing postmasters and other minor officials. As he explained during the interlude between his presidency and his chief justiceship:

I cannot exaggerate the waste of the President's time and the consumption of his nervous vitality involved in listening to Congressmen's intercession as to local appointments. Why should the President have his time taken up in a discussion over the question who shall be postmistress at the town of Devil's Lake in North Dakota?¹⁶⁸

¹⁶⁶ An incomplete search of government documents reveals that President Taft sought to remove at least 175 postmasters during his term. He did so by submitting the name of the replacement to the Senate for its approval. See, e.g., 48 CONG. REC. 9239 (1912) (seeking consent to remove postmasters in Illinois, Kentucky, and Minnesota); 45 CONG. REC. 62 (1909) (seeking consent to remove postmasters in Oklahoma, Pennsylvania, South Carolina, and West Virginia). Senate confirmation of the replacement necessarily constituted advice and consent to the removal of the incumbent.

¹⁶⁷ When the Senate failed to act on proposed removals, Taft invariably resubmitted the name of the replacement. Consider the example of Frank E. Britton. Taft sought to oust him as postmaster of Jonesboro, Tennessee, by nominating James S. Byrd for the position. 47 CONG. REC. 54 (1911). The Senate did not vote on the Byrd nomination before adjournment. When Congress reconvened, Taft proposed Byrd once more. 48 CONG. REC. 86 (1911). This time the Senate confirmed the appointment, which resulted in the discharge of Britton. 48 CONG. REC. 2775 (1912).

On one occasion, however, Taft's persistence proved unavailing. He tried three times to remove John G. Gorth as postmaster of Oconomowoc, Wisconsin. 46 CONG. REC. 73 (1910); 47 CONG. REC. 54 (1911); 48 CONG. REC. 87 (1911). The Senate never voted on the nomination of W.A. Jones to replace Gorth. At no time did Taft object to this legislative frustration of his personnel preferences.

¹⁶⁸ W. TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 67 (1916). See also *id.* at 60-61 (suggesting that the requirement of Senate confirmation of postmasters had introduced unfortunate political considerations into the post office). Significantly, Taft does not mention the statutory requirement of Senate consent for the removal of postmasters anywhere in this discussion.

It is, of course, true that lawyers generally accord little interpretive value to such extrajudicial statements. In this instance, however, they serve as a counterweight to Taft's own quotation from John Marshall's biography of George Washington to blunt the force of awkward dicta in *Marbury* concerning the limits of the President's removal power. See 272 U.S. at 143-44.

Indeed, Taft had urged that the President be required to appoint only members of the cabinet and a single undersecretary in each department. All other executive personnel, including assistant secretaries and bureau chiefs, would be civil servants with "permanent tenure."¹⁶⁹ It seems almost impossible to reconcile this extraordinarily narrow view of presidential appointment power with the emphasis in *Myers* upon the President's absolute need to command the unquestioned fidelity of all subordinates, a need so essential to sound government that the chief executive must have the unfettered right to discharge each subordinate at any time and for any reason.

The answer to this intriguing question seems to be that Taft was what the British call a King's-party man, a person who ascribes unique wisdom to the head of state, simply by virtue of occupancy of that exalted position. A King's-party man believes that only the head of state is capable of discharging the powers and duties of the office and therefore should not have to suffer interference with sovereign prerogatives.¹⁷⁰ Long before his presidency—indeed, thirty-five years before his *Myers* opinion—Taft, as Solicitor General, had argued publicly and privately for an expansive view of executive authority over removals.¹⁷¹ But Taft was an ambivalent King's-party man; because he despised the give and take of mundane political affairs,

¹⁶⁹ W. TAFT, *supra* note 168, at 70-71.

¹⁷⁰ See E. DREW, *supra* note 13, at 47, 397.

¹⁷¹ Taft had argued successfully in favor of broad presidential removal power in one of the earlier cases. *McAllister v. United States*, 141 U.S. 174, 175 (1891). There is a delicious irony about Taft's involvement in this case: he based his entire argument in support of the legality of the removal at issue upon the government's compliance with the Tenure of Office Act, *id.* at 177, the same statute that he would retrospectively invalidate in *Myers*.

In the same year, he also advised Assistant Secretary of the Treasury A.L. Spaulding of his distaste for limiting removals to "cause." His letter said in part:

It is impossible to properly conduct a department and limit the power of removal to cases where specific charges can be proven of inefficiency, negligence, or want of fidelity. All I can say is that if I were Secretary of the Treasury, in charge of the duty of administering that great department, I should not wish to have as one of my subordinates a man who allows himself to manifest so much sympathy, and render so much substantial aid to persons whose interests are entirely opposed to that of the Government.

A. MASON, WILLIAM HOWARD TAFT: CHIEF JUSTICE 254 (1965).

he urged Congress to relieve the President of all but the most significant personnel decisions. As long as the chief executive had to concern himself with the trivialities of low-level appointments, he should have complete authority to remove anyone whom he had installed in office. On the other hand, only a few high-level positions really required direct presidential supervision; the remainder could be filled in other ways with no harm to the public interest.

However perplexing the decision and all of its surrounding circumstances, the Court appeared to have resolved the long debate over the removal power, once and for all, in favor of the President.¹⁷² Congress acknowledged this broad reading by omitting any reference to removal in several important new regulatory statutes passed shortly after the decision.¹⁷³ Still unsettled, however, was the validity of preexisting statutes that purported to restrict the grounds for removal to specified causes. The answer to this question was not long in coming.

B. The Humphrey's Executor Decision

Within nine years, the apparent finality of *Myers* would be called into doubt. In *Humphrey's Executor v. United States*,¹⁷⁴ a unanimous Court "recanted much of the Taft opinion"¹⁷⁵ by holding that a statutory provision authorizing the dismissal of Federal Trade Commissioners "for inefficiency, neglect of duty, or malfeasance in office"¹⁷⁶ precluded the President from ousting

¹⁷² Ironically, more than 30 years after *Myers* invalidated the statutory requirement of Senate consent for the removal of local postmasters, federal law still required the upper chamber to approve the discharge of the Postmaster General and the Assistant Postmasters General. E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 375 n.64 (4th ed. 1957).

¹⁷³ *E.g.*, Communications Act of 1934, ch. 652, §§ 1, 4, 48 Stat. 1064, 1066 (current version at 47 U.S.C. §§ 151, 154 (1982 & Supp. III 1985) (Federal Communications Commission); Securities Exchange Act of 1934, ch. 404, § 4, 48 Stat. 881, 885 (current version at 15 U.S.C. § 78d (1982 & Supp. III 1985) (Securities and Exchange Commission)).

¹⁷⁴ 295 U.S. 602 (1935).

¹⁷⁵ E. CORWIN, *supra* note 172, at 91.

¹⁷⁶ Federal Trade Commission Act, ch. 311, § 1, 38 Stat. 717, 718 (1914) (codified at 15 U.S.C. § 41 (1982)).

This language was taken from the removal provision of the Interstate Commerce Act. *See supra* note 105 and accompanying text. As with that statute, Congress devoted

a commissioner for purely political reasons and that this provision did not unconstitutionally constrain the President's removal power.

This holding was remarkable for at least three reasons. First, the Taft opinion in *Myers* had gone out of its way to suggest that such provisions did not limit the President's inherent authority to remove.¹⁷⁷ Second, that suggestion in *Myers* rested upon the express holding of *Shurtleff v. United States*,¹⁷⁸ which construed identical statutory language.¹⁷⁹ Third, the four remaining members of the *Myers* majority approved this conclusion unhesitatingly; one of them, Justice Sutherland, actually wrote the *Humphrey's Executor* opinion. Behind this mysterious judicial about-face lie some understandable political and historical explanations. Nevertheless, *Humphrey's Executor*, like *Myers*, has more than its share of ironies and curiosities.

The factual background in *Humphrey's Executor* was more straightforward than that in *Myers*.¹⁸⁰ William E. Humphrey, a lawyer from Seattle, Washington, was elected to seven terms in the House of Representatives beginning in 1902. His tenure was marked by extreme conservatism, outspokenly partisan attacks upon his opponents, and great solicitude for the merchant marine and shipping interests that were important to his constituents. After an unsuccessful run for the Senate in 1916, he played an active role in Republican party affairs and aggressively sought a government appointment as a reward for his loyalty. His efforts bore fruit in 1925, when President Coolidge named him to the Federal Trade Commission.

In that position, Humphrey took a central part in redirecting agency policies and procedures away from strong enforcement

little or no independent attention to the meaning or significance of this provision when it passed the FTC Act. See R. CUSHMAN, *supra* note 16, at 198-99. The standard early study of the agency does not mention the subject. See G. HENDERSON, *THE FEDERAL TRADE COMMISSION 1-48* (1924) (reviewing background and legislative history of FTC Act).

¹⁷⁷ 272 U.S. at 171-72.

¹⁷⁸ 189 U.S. 311 (1903).

¹⁷⁹ See *supra* notes 120-23 and accompanying text.

¹⁸⁰ The basic facts are set out in the opinion of the Court. 295 U.S. at 618-19. For more detailed accounts, see Leuchtenburg, *supra* note 165, at 276-80; N.Y. Times, Sept. 18, 1933, at 4, col. 3; *id.*, Oct. 8, 1933, § 1, at 24, col. 2; *id.*, Oct. 10, 1933, at 29, col. 2; *id.*, Dec. 29, 1933, at 2, col. 8; *id.*, Feb. 15, 1934, at 19, col. 1.

of the antitrust laws. In 1931, President Hoover renominated Humphrey, who had come to personify the evils that had led many critics to urge the abolition of the FTC, for another seven-year term. The Senate confirmed him, but twenty-eight members voted against the reappointment.

Although many of the Commission's difficulties in this period resulted from restrictive judicial rulings,¹⁸¹ the agency was widely viewed as "a dumping ground for [undeserving beneficiaries of] political patronage."¹⁸² President Roosevelt decided to replace Humphrey with a less obstreperous Republican who, together with two other new appointees, might revitalize the bipartisan, five-member Commission. That in turn would qualify the FTC for important new responsibilities in Roosevelt's economic recovery program.¹⁸³ When Humphrey refused repeated requests to resign, the President peremptorily removed him from office.¹⁸⁴ No reason was given for the removal, although the White House's last letter to Humphrey prior to the formal ouster made clear that the action was based upon policy differences.¹⁸⁵

Humphrey challenged his removal, retaining William Donovan, a distinguished Republican attorney who had held a variety of important governmental positions and who would go on to an almost legendary career in both the public and private sectors.¹⁸⁶ Although Humphrey had sought to turn his case into a

¹⁸¹ See C. MCFARLAND, *JUDICIAL CONTROL OF THE FEDERAL TRADE COMMISSION AND THE INTERSTATE COMMERCE COMMISSION, 1920-1930*, at 43-99 (1933); Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1231-33 (1986).

¹⁸² E. COX, R. FELLMETH & J. SCHULZ, *THE NADER REPORT ON THE FEDERAL TRADE COMMISSION* 140 (1969).

¹⁸³ See *id.*; R. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 107 (1941); Leuchtenburg, *supra* note 165, at 280, 305-08.

¹⁸⁴ See Leuchtenburg, *supra* note 165, at 281-88.

¹⁸⁵ That letter, dated August 31, 1933, said in part:

You will, I know, realize that I do not feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission, and, frankly, I think it is best for the people of this country that I should have a full confidence.

295 U.S. at 619.

Humphrey was informed of his dismissal in a one-sentence notice. He was replaced by George C. Matthews, a Republican and long-time member of the Wisconsin Public Utilities Commission. Leuchtenburg, *supra* note 165, at 288.

¹⁸⁶ Donovan had held a variety of positions in the Justice Department (including a stint as Acting Attorney General) during the Coolidge administration and had run

partisan issue, he did not seek reinstatement; instead he filed suit in the Court of Claims for his unpaid salary. The government was so confident of its legal position that Solicitor General Reed, looking for an easy victory, chose the case for his first Supreme Court appearance.¹⁸⁷

The Court, like the new solicitor general, found this an easy case.¹⁸⁸ To the chagrin of the administration, however, the justices found it easy in favor of Humphrey. Justice Sutherland, who not only had joined the Taft opinion in *Myers* but also had been a vocal opponent of the legislation establishing the FTC when he served in the Senate,¹⁸⁹ wrote the opinion. And it was a most curious opinion indeed.

Perhaps as a result of the tenor of the *Myers* opinion, the *Humphrey's Executor* Court did not focus upon the quite different statutory removal provisions but rather upon the precise location of the offices in question. The postmaster in *Myers* was a purely executive officer, "charged with no duty at all related to either the legislative or judicial power."¹⁹⁰ By contrast, a Federal Trade Commissioner "cannot in any proper sense be characterized as an arm or an eye of the executive . . . [because] the commission acts in part quasi-legislatively and in part quasi-judicially."¹⁹¹ The legislative history plainly indicated that Congress meant for the FTC "not to be 'subject to anybody in the government but . . . only to the people of the United States'; . . . to be 'separate and apart from any existing department of the government—not subject to the orders of the President.'"¹⁹²

unsuccessfully for governor of New York as the Republican candidate in 1932. This last effort, of course, was the race to win President Roosevelt's previous office. See generally T. TROY, DONOVAN AND THE CIA 25-27 (1981).

¹⁸⁷ Leuchtenburg, *supra* note 165, at 289-91.

The case had reached the Supreme Court when the Court of Claims certified the constitutional questions raised by Humphrey's dismissal for interlocutory review. 295 U.S. at 618.

¹⁸⁸ It took the Court just under four weeks to issue its decision in *Humphrey's Executor*. See 295 U.S. at 602.

¹⁸⁹ R. CUSEMAN, *supra* note 16, at 203-04, 210-12; L. JAFFE & N. NATHANSON, CASES AND MATERIALS ON ADMINISTRATIVE LAW 158 (4th ed. 1976).

¹⁹⁰ 295 U.S. at 627.

¹⁹¹ *Id.* at 628.

¹⁹² *Id.* at 625. The quotations are from the congressional debates, but the Court does not cite either the speakers or the place where those statements appear.

Instead, the Commission was "an agency of the legislative or judicial departments" that might exercise "executive functions—as distinguished from executive power in the constitutional sense."¹⁹³ The Court "disapproved" the broad language of *Myers* as dictum having no binding effect.¹⁹⁴ The opinion distinguished the troublesome *Shurtleff* decision on the somewhat dubious ground that the statute in question there said nothing about the duration of the appointment, whereas the FTC Act provided for fixed terms of seven years.¹⁹⁵

As in *Myers*, the Court's reasoning prompts numerous questions. At the most basic level, the definition of a "purely executive" officer is elusive at best.¹⁹⁶ Even the postmaster in *Myers* had the duty to exclude obscene and fraudulent matter from the mails; determining what items fell within those categories seems closer to a judicial than to an executive function.¹⁹⁷

As for the FTC itself, the Court failed to explain how an agency can be free from political control by anyone in the government. It is also unclear how the Commission could be in both the legislative and judicial branches simultaneously in light of the Court's emphasis upon the "fundamental necessity for maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others."¹⁹⁸ Finally, it is difficult to understand why "an administrative body created by Congress to carry into effect legislative policies embodied in [a] statute . . . cannot in any proper sense be characterized as an arm or an eye of the executive,"¹⁹⁹ when that seems to be the very definition

¹⁹³ *Id.* at 628.

¹⁹⁴ *Id.* at 626.

¹⁹⁵ *Id.* at 622-23.

The *Shurtleff* Court seemed troubled that so minor a presidential appointee as a general appraiser would, in effect, acquire life tenure if the statutory grounds for removal were construed as exclusive. *Shurtleff v. United States*, 189 U.S. 311, 315-17 (1903). See *supra* note 123. Of course, the same official would acquire life tenure, subject to removal for cause, if selected as a civil servant under the merit system rather than as a political appointee.

¹⁹⁶ See Bruff, *supra* note 165, at 479-80.

¹⁹⁷ See Nathanson, *supra* note 93, at 1101. See also *infra* notes 244-56 & 294-300 and accompanying text.

¹⁹⁸ 295 U.S. at 629.

¹⁹⁹ *Id.* at 628.

of an executive organ.²⁰⁰ The Court's unadorned distinction between an "executive function" and "executive power in the constitutional sense"²⁰¹ is singularly unilluminating in this respect.

Whatever analytical difficulties the *Humphrey's Executor* opinion may pose, the question remains why the Court retreated so drastically from the seemingly clear and expansive views enunciated in *Myers*. The most common explanation emphasizes that the decision was handed down on the same day as *A.L.A. Schechter Poultry Corp. v. United States*,²⁰² another unanimous and far more significant ruling involving executive authority. In *Schechter*, the Court invalidated the National Industrial Recovery Act, part of the core of the President's reform program. Various commentators have suggested that the Court had grown concerned over undue concentrations of presidential power and that the prospect of wholesale removals of recalcitrant officials serving on nonpartisan "expert" tribunals led the justices to blink at the broadest implications of the *Myers* opinion.²⁰³ It has also been hypothesized that the emergence of European dictatorships during this period may have sensitized the Court to the dangers of excessive executive power.²⁰⁴

The administration predictably viewed the matter less dispassionately. The decision reportedly enraged President Roosevelt, who regarded it as a political attack against him by an unremittingly hostile judiciary. His reaction was so strong that it may have precipitated his ill-fated Court-packing plan.²⁰⁵ In

²⁰⁰ See Bruff, *supra* note 165, at 480 n.141.

²⁰¹ Strauss, *supra* note 74, at 611-12.

²⁰² 295 U.S. 495 (1935).

²⁰³ See, e.g., Van Alstyne, *supra* note 157, at 115-16; Strauss, *supra* note 74, at 611; see also Burkoff, *supra* note 16, at 1406 n.332; Scalia, *Historical Anomalies in Administrative Law*, 1985 Y.B. SUP. CT. HIST. SOC'Y 103, 107-08.

²⁰⁴ See Strauss, *supra* note 74, at 612 n.154.

²⁰⁵ Leuchtenburg, *supra* note 165, at 310-11.

The President was particularly upset that the opinion did not even recognize that he might have relied in good faith upon the broad language in *Myers*. Administration officials thought the decision had been written "with a design to give the impression that the President had flouted the Constitution, rather than that the Court had changed its mind within the past ten years." R. JACKSON, *supra* note 183, at 109. Justice Jackson later recalled that Roosevelt "thought [the justices] went out of their way to spite him personally and they were giving him a different kind of deal than they were giving Taft

addition, the ruling apparently prompted him to abandon his ambitious plans to reform the FTC and may have led him to seek alternative means for controlling administrative agencies.²⁰⁶

Beyond analytical difficulties with the opinion and factors that led to the Court's change of mind, there remains the problem of assessing the legal implications of *Myers* and *Humphrey's Executor*. One might reconcile the holdings of these contrasting decisions in two ways. The first focuses upon the statutory provisions at issue. In *Myers*, the Senate was made a formal part of the removal process by virtue of the requirement that it consent to the dismissal of postmasters before the expiration of their terms. In *Humphrey's Executor*, Congress limited the grounds for firing a Federal Trade Commissioner, but the President retained the power to remove. Indeed, Solicitor General Beck urged precisely such a "middle ground" in *Myers*, but the Court could not, or would not, grasp it.²⁰⁷

[sic]." E. GERHART, *AMERICA'S ADVOCATE: ROBERT H. JACKSON* 99 (1958).

Another presidential aide recalled Roosevelt's regret that he had not pressed formal charges against Humphrey. Harold Ickes reported that the President claimed to have "actual proof of malfeasance in office" but thought "he could get rid of [Humphrey] by milder methods." Leuchtenburg, *supra* note 165, at 310 (quoting 1 H. ICKES, *THE SECRET DIARY OF HAROLD ICKES* 374 (1954)).

²⁰⁶ See E. COX, R. FELLMEYER & J. SCHULZ, *supra* note 182, at 140. On the effort to bring the agencies under greater presidential control, see B. KARL, *supra* note 1, at 190-95.

²⁰⁷ 272 U.S. at 96 (oral argument for the United States).

The point arose at two different places in the Solicitor General's oral argument. He first broached the subject as follows:

It is not necessary in this case to determine the full question as to this power of removal. This Court can say that this particular Act is unconstitutional, without denying to the Congress the power to create legislative standards of public service, which have a legitimate relation to the nature and scope of the office, and the qualifications of the incumbent.

Id. at 90.

He returned to this question soon afterward, saying:

If you take my middle ground, that Congress may guide and direct the discretion of the President by such statutory qualifications as are properly inherent in the nature of an office, but without disturbing the power of removal as the Constitution vested it, Congress can not destroy the independence of the Executive.

Id. at 96. The government developed this line of argument in more detail in its brief. See Substitute Brief for the United States on Reargument, *reprinted in* S. Doc. No. 174, *supra* note 129, at 69-71.

Just moments later, Chief Justice Taft engaged the Solicitor General in the following

This middle ground approach would hold that arrangements such as the Tenure of Office Act are unconstitutional because they give Congress a direct role in the removal process. Legislative involvement poses a serious risk that Congress will seek to aggrandize its power at the President's expense by arbitrarily withholding consent to the discharge of officials who have lost the chief executive's confidence.²⁰⁸ This risk is especially acute with respect to cabinet members, as the events surrounding the impeachment of Andrew Johnson graphically illustrate.²⁰⁹ These department heads are directly responsible to the President²¹⁰ and, as Chief Justice Taft correctly emphasized in *Myers*, they perform duties involving the exercise of discretion virtually as presidential alter egos.²¹¹ Concern over the implications of requiring the President to retain an unsatisfactory person in so sensitive a position undoubtedly influenced the members of the First Con-

colloquy:

THE CHIEF JUSTICE. Mr. Beck, would it interrupt you for me to ask you to state specifically what your idea is in regard to the middle ground to which you referred? What kind of a method did you mean?

MR. BECK. Well, I instanced one case, Mr. Chief Justice. I will try to give two or three illustrations: Take, for example, the kind of law I first cited, a law that says that an office is created and that the President shall appoint somebody to the office, and that he shall be removable for inefficiency and dishonesty. That largely leaves the President's prerogative untouched.

THE CHIEF JUSTICE. Do you mean that he still would retain the power of absolute removal without having any such cause as that mentioned in the statute?

MR. BECK. Exactly. And he would apply the legislative standard that had been given to him, viz, whether the incumbent was inefficient or dishonest.

272 U.S. at 96 (oral argument for the United States).

The exchange suggests two completely different understandings of the "middle ground." The Solicitor General plainly meant that a statute of the sort at issue in *Humphrey's Executor* would be a permissible means of limiting the grounds upon which the President might remove an appointed officer. Chief Justice Taft, on the other hand, apparently viewed *Shurtleff* as controlling, thereby leaving the President with unfettered discretion to remove on the statutory grounds or any other.

²⁰⁸ See Strauss, *supra* note 74, at 614.

²⁰⁹ See *supra* text accompanying notes 94-98.

²¹⁰ The President is authorized to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices." U.S. CONST. art. II, § 2, cl. 1.

²¹¹ 272 U.S. at 132-35.

gress as they debated the power to remove cabinet officers in 1789.²¹²

The difficulty with this analysis is that, on purely logical grounds, the argument becomes less compelling when applied to lower-ranking officials such as local postmasters, who are far removed from meaningful contact with the President.²¹³ Nevertheless, one might find that, as a matter of history, the conflict over the Tenure of Office Act shows that the formal involvement of Congress in the process of removing governmental officers (other than by way of the rarely used device of impeachment) poses unacceptable risks of internecine political warfare between the legislative and executive branches. Those same risks exist even with respect to many subordinate officers. In other words, just as the proper construction of the appointments clause is a matter of practicality rather than of pure logic, so also has a practical consensus emerged on the question of removal.

A more elaborate, but perhaps equally problematical, focus upon the structure of the Constitution also suggests that the analysis retains much of its force even for subordinate officers. After all, the department heads must have high-level assistants to aid them in implementing presidential policy. At some point, however, the argument becomes unconvincing; every assistant presumably also needs an assistant, a proposition that leads ineluctably to Chief Justice Taft's position in *Myers*. One might arbitrarily distinguish offices as to which congressional participation in removals poses unacceptable risks from those as to which it does not. Hard questions undoubtedly would arise over how and where to draw the line. The resulting categories probably would correspond roughly to the positions of superior officers, who must be appointed by the President with the advice and consent of the Senate, and inferior officers, who may be appointed by the department heads.

The precise classification of any particular office does not pose significant problems for this structural argument, however. The danger of congressional aggrandizement at the expense of the executive precludes direct legislative participation (other than

²¹² See *supra* notes 74-75 and accompanying text.

²¹³ See Van Alstyne, *supra* note 157, at 114-15.

by way of impeachment) in the dismissal of superior officers who are directly responsible to the President. As for lower-ranking personnel, a Congress that is unwilling to afford the chief executive unlimited removal authority could create more inferior offices. The appointments clause allows such positions to be filled by the heads of departments, with the President completely excluded from the selection process. Because the power to remove is incident to the power to appoint, the chief executive could not dismiss the holders of these inferior offices.²¹⁴ The availability of this alternative means of checking presidential power suggests that direct congressional participation in removal, as provided in the Tenure of Office Act and the postmaster statute, is not necessary and proper to the attainment of any lawful legislative goal.²¹⁵

At the same time, this approach would allow Congress to set standards for removals that would bind the President. Thus, the legislative branch might permit the chief executive to discharge at least certain appointed officials only for cause.²¹⁶ Congress could specify the grounds for removal pursuant to its power

²¹⁴ See *supra* text accompanying notes 103 & 115-16.

²¹⁵ At first glance, this structural argument seems inconsistent with Chief Justice Marshall's authoritative construction of the necessary and proper clause: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819). Marshall's interpretation appears to leave the choice of means to Congress, subject only to deferential judicial review. Marshall refused to "impute to the framers . . . , when granting these powers for the public good, the intention of impeding their exercise, by withholding a choice of means." *Id.* at 408. He construed the word "necessary" to permit the use of "any means calculated to produce the end," thus rejecting a definition limited to "those single means, without which the end would be entirely unattainable." *Id.* at 413-14.

The *McCulloch* case, however, did not involve any textual provision of the Constitution that limits Congress' choice of means toward fulfilling a legitimate end. Marshall expressly cautioned that, even under an expansive reading of the necessary and proper clause, the government could not exceed the limits of its powers. *Id.* at 421. In these terms, the end—constraining arbitrary presidential power—assuredly is legitimate; the means, however, are not appropriate. See Nathanson, *supra* note 93, at 1105.

²¹⁶ Whether Congress may apply a for-cause requirement to the dismissal of cabinet officers has led to disagreement among distinguished commentators. Compare Nathanson, *supra* note 93, at 1107-09 (suggesting an affirmative answer), and Strauss, *supra* note 74, at 614 (same), with Van Alstyne, *supra* note 157, at 114 (suggesting a negative answer).

under the necessary and proper clause to create positions and to fix the terms, conditions, and qualifications for all governmental offices.²¹⁷ The House and Senate would have no role in the removal process other than having determined in advance the permissible grounds for dismissal. Therefore, the risk of inter-branch political struggles over individual personnel matters would be much attenuated if not eliminated altogether.

Another reconciliation of *Myers* and *Humphrey's Executor* focuses primarily upon the functions of the offices in question. Although Justice Sutherland suggested infelicitously that the *Myers* rule applied only to "purely executive" officers, defining such positions is exceedingly difficult. Placing that issue to one side for the moment, the duties of postmasters and FTC commissioners were sufficiently different that the President might be entitled to varied levels of control over the two types of officials. Despite the responsibilities of local postmasters under the fraud and obscenity laws,²¹⁸ these duties constitute a relatively minor portion of their work. Moreover, their discretion to make rules for the efficient operation of their own post offices seems unlikely to impinge noticeably upon congressional authority. Thus, allowing the President greater latitude in supervising and discharging local postmasters does not appear to raise important policy concerns.

On the other hand, the FTC had three principal functions, according to the *Humphrey's Executor* Court. First, it could issue cease and desist orders against unfair methods of competition following a formal adjudicatory proceeding. Second, it could undertake investigations and recommend appropriate legislation to Congress. Third, at the direction of a federal district court, it could act as a master in chancery in antitrust suits

²¹⁷ This analysis is consistent with that of Chief Justice Taft, although he rejected the conclusion reached in the text. In *Myers*, he noted the existence of matters "so peculiarly and specifically committed to the discretion of a particular [executive] officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance." 272 U.S. at 135. If policy considerations require the insulation of some executive personnel from direct presidential supervision of particular decisions, presumably policy considerations may require that executive personnel be protected against wholly arbitrary dismissal. See Strauss, *supra* note 74, at 614.

²¹⁸ See *supra* text accompanying note 197.

brought by the Attorney General.²¹⁹ The first and third of these functions involved the judicial process, in which considerations of due process and basic fairness to litigants suggest the impropriety of direct presidential supervision. The second rendered the Commission something of a congressional agent.²²⁰ Because the agency's main functions were not executive in nature, the President's claim to supervision over its members was correspondingly weaker. Thus, Congress might appropriately limit the grounds upon which the President may remove such commissioners.

In its only other pre-*Bowsher* foray into this thicket, the Court opted for the functional approach. That case was notable, not only for making that choice, but also for extending the analysis even to positions concerning which Congress had said nothing whatever about the subject of removal. Nevertheless, this approach also raised difficult questions.

C. *The Wiener Decision*

Nearly a generation passed before the Court revisited the removal question. The next case, *Wiener v. United States*,²²¹ arose just as *Humphrey's Executor* had, from the effort of an incoming President to replace officials originally chosen by a predecessor belonging to the opposing political party. There were two differences this time. First, the incoming chief executive was a Republican rather than a Democrat. Second, this dismissal involved a small agency that seems to have been more obscure than controversial. In short, this case apparently arose as an almost pure patronage matter, whereas *Humphrey's Executor* could be characterized at least in part as a basic difference of principle.

The agency in question was the War Claims Commission, which had been created in 1948 to adjudicate the entitlement to compensation of persons and religious organizations injured by the enemy in World War II. The Commission had three members, each of whom was appointed by President Truman, and

²¹⁹ 295 U.S. at 620-21.

²²⁰ See Bruff, *supra* note 165, at 481-82; Strauss, *supra* note 74, at 612-14.

²²¹ 357 U.S. 349 (1958).

was to go out of existence on March 31, 1955, three years after the deadline for filing claims. The statute establishing the Commission said nothing about removal.²²²

During his first year in office, President Eisenhower sought the resignations of two of the three Commissioners. One was Myron Wiener, a California lawyer who had spent a number of years in China and was himself interned by the Japanese from 1941 until 1943.²²³ The other was Georgia Lusk, a former Democratic Representative from New Mexico.²²⁴ When they refused to resign, the President formally removed them. Eisenhower said only that he "regard[ed] it as in the national interest" to operate the Commission "with personnel of my own selection."²²⁵ Just over six months later, on July 1, 1954, he abolished the agency altogether under a reorganization plan.²²⁶ The ousted Commissioners then filed suit for their salaries.²²⁷

²²² The statement of facts, unless otherwise indicated, is taken from the opinion of the Court. *Id.* at 350-51.

²²³ N.Y. Times, June 9, 1950, at 4, col. 1.

²²⁴ N.Y. Times, Dec. 12, 1953, at 19, col. 2.

²²⁵ 357 U.S. at 350.

Wiener believed that he had been removed for purely political reasons. In reply to President Eisenhower's notice of dismissal, Wiener wrote:

While the exigencies of party politics and political commitments make certain demands, I do not believe such circumstances should afford The [sic] President a basis for ignoring the Congressional mandate to each member of the Commission to assist the Congress in performing its traditional legislative functions of investigation and the judicial determination of the rights of innocent victims of World War II to relief under an Act of Congress.

Letter from Myron Wiener to the President, Dec. 14, 1953 (copy on file with author).

²²⁶ The reorganization plan was issued pursuant to the Reorganization Act of 1949, ch. 226, 63 Stat. 203.

²²⁷ The decision discussed in the text actually concerned only Wiener's suit for back salary for the period from December 10, 1953, the effective date of the removal, to June 30, 1954, the last day of the Commission's existence. The Court of Claims, with one judge dissenting, dismissed this suit. *Wiener v. United States*, 135 Ct. Cl. 827, 142 F. Supp. 910 (1956), *rev'd*, 357 U.S. 349 (1958).

There is a little-known historical footnote to this phase of the affair. Chief Justice Burger, who was an assistant attorney general at the time, signed the government's answer and brief in the Court of Claims. Burger's name does not appear in the reported decision because he became a member of the United States Court of Appeals for the District of Columbia Circuit before the Court of Claims issued its ruling. Accordingly, his successor was substituted as counsel of record. *See* 135 Ct. Cl. at 827, 142 F. Supp. at 911. The parties and *amici* in *Bowsher* apparently were unaware of the Chief Justice's

A unanimous Court, in an opinion by Justice Frankfurter, ruled that the adjudicatory functions performed by the Commission precluded the President from arbitrarily discharging its members despite the statute's total silence on the subject. *Humphrey's Executor*, the Court reasoned, gave the President unfettered power to remove only purely executive officers; as for those exercising independent judgment, "a power of removal exists only if Congress may fairly be said to have conferred it."²²⁸

The best way to tell whether Congress implicitly had authorized the President at his discretion to discharge someone other than a purely executive officer was to examine the function that the officer exercised. Although Congress could have vested the authority of the War Claims Commission in a purely executive official,²²⁹ it had not. Instead, it gave the task to a body charged to "adjudicate according to law."²³⁰ Moreover, the determinations of the Commission were not subject to judicial review and thus were final.²³¹ Because the chief executive plainly could not attempt to influence the outcome of any particular claim before the agency, it was only logical to infer that "Congress did not wish to have hang over the Commission the Damocles' sword

involvement in *Wiener*, and he did not refer to that experience in his *Bowsher* opinion. See also *infra* note 300 (discussing *Farley v. United States*, 134 Ct. Cl. 672, 139 F. Supp. 757, *cert. denied*, 352 U.S. 891 (1956), another removal case in which the Chief Justice participated during his tenure as assistant attorney general).

After the Supreme Court overturned the Court of Claims ruling in *Wiener*, see *infra* text accompanying notes 228-32, Commissioner Lusk also filed a claim for her pay through June 30, 1954. That claim was paid without litigation. See *Lusk v. United States*, 173 Ct. Cl. 291, 294-95 (1965), *cert. denied*, 383 U.S. 967 (1966).

In a later action, both ousted members challenged the constitutionality of the order abolishing the War Claims Commission and demanded their salaries from the effective date of the reorganization plan that terminated the agency through the date upon which it otherwise would have gone out of existence. This suit was dismissed on grounds of laches. 173 Ct. Cl. at 298-302.

²²⁸ 357 U.S. at 353.

Before reaching this conclusion, the Court belatedly recognized that President Roosevelt had relied upon the expansive statements in *Myers* when he dismissed Humphrey from the FTC. *Id.* at 351.

²²⁹ The original legislative proposal for dealing with these claims would have vested responsibility in the Federal Security Administrator, who was "indubitably an arm of the President." *Id.* at 354.

²³⁰ *Id.*

²³¹ *Id.* at 354-55.

of removal by the President for no reason other than that he preferred to have on that Commission men of his own choosing."²³² Since the agency performed adjudicatory functions, the President could remove its members only for cause.

Over the years, there have been numerous attempts to harmonize this line of cases.²³³ That is not surprising, because Justice Sutherland recognized explicitly that a "field of doubt" would be left by the apparently inconsistent rulings in the removal cases.²³⁴ The two principal methods of reconciling these decisions focus either upon the procedure for removal or upon the functions performed by the officer in question. Each is examined in greater detail in Part IV. Yet one practical lesson emerges from the discussion thus far: whatever the formal legal outcome, Presidents always have managed to rid themselves of officials whom they have found objectionable for one reason or another. Wilson ousted Myers and won a posthumous victory when the statute the postmaster invoked was held unconstitutional. Even if the statute had been upheld, however, Myers still would have been removed; he could have recovered only his back salary. Similarly, Roosevelt succeeded in replacing Humphrey with a less recalcitrant Federal Trade Commissioner even though the government had to pay his salary during the period following his ouster. Indeed, Frank Myers and William Hum-

²³² *Id.* at 356.

The reference to the Sword of Damocles most likely was drawn from Professor Corwin's critique of the *Myers* decision, which uses the term precisely as it appeared in Justice Frankfurter's opinion. In the preface to his study, Corwin argued that the President should not be able to fire a member of the Interstate Commerce Commission at will. How, he asked, could one expect the necessary independent judgment from "an officer over whose head the Damocles sword of removal is ever suspended?" E. CORWIN, *supra* note 63, at viii.

Justice Frankfurter almost certainly had read the Corwin monograph, which dealt in great detail with separation-of-powers problems. Before his appointment, Frankfurter had been a leading scholar and teacher of administrative law. In the early 1930's, he devoted the bulk of his course to separation-of-powers issues. Nathanson, *supra* note 93, at 1064.

²³³ See, e.g., L. TRIBE, *supra* note 57, at 186-91; Bruff, *supra* note 165, at 475-83; Burkoff, *supra* note 16, at 1393-415; Donovan & Irvine, *supra* note 165, at 220-29; Nathanson, *supra* note 93, at 1099-109; Parker, *The Removal Power of the President and Independent Administrative Agencies*, 36 IND. L.J. 63 (1960); Strauss, *supra* note 74, at 609-16.

²³⁴ *Humphrey's*, 295 U.S. at 632.

phrey died before the ultimate Supreme Court rulings in their lawsuits, leaving legal representatives to press their arguments. This fact has prompted some cynical observers to find the real lesson of these cases in their titles.²³⁵ Finally, Eisenhower succeeded not only in ridding himself of two War Claims Commissioners but also managed to eliminate the agency itself. To date, the Court has never ordered the President to reinstate an official whom he has sacked.²³⁶ For most political sophisticates, that is the real moral of these cases.

IV. CONGRESS, THE PRESIDENT, AND THE REMOVAL OF THE COMPTROLLER GENERAL

Bowsher concerned the procedure for removing a federal officer who was to play a central role in the resolution of one of the most important political and economic questions confronting the nation. Unlike any of the previous controversies, the procedure in question gave Congress rather than the President the initiative to dismiss the officer. Indeed, Congress could accomplish the removal over the objection of the President and on grounds that would not suffice to impeach the official. At the same time, however, neither an actual nor an attempted discharge had occurred. Instead, the question involved whether the Comptroller General could exercise the powers vested in him by the Gramm-Rudman-Hollings Act in light of the method by which the statute creating his office permitted him to be removed in the future.

A. *The Statutory Removal Procedure*

The relevant portion of the statute governing the removal of the Comptroller General provides:

²³⁵ J. MASHAW & R. MERRILL, *CASES AND MATERIALS ON ADMINISTRATIVE LAW* 116 (2d ed. 1985) (quoting an unidentified colleague); Note, *Incorporation of Independent Agencies into the Executive Branch*, 94 YALE L.J. 1766, 1784 n.117 (1985). The full captions of the cases in the Supreme Court were *Lois Myers, Administratrix v. United States* and, of course, *Humphrey's Executor v. United States*.

²³⁶ As Clinton Rossiter put it, these cases demonstrate that "the President can remove just about any official if he wants to badly enough, and the [Supreme] Court will not be able to give the removed man anything more than sympathy and some back salary." C. ROSSITER, *THE AMERICAN PRESIDENCY* 58 (2d ed. 1960). But see L. TRIBE, *supra* note 57, at 189 (suggesting that courts may order reinstatement).

[The] Comptroller General . . . may be removed at any time by—

. . .

(B) joint resolution of Congress, after notice and an opportunity for a hearing, only for—

- (i) permanent disability;
- (ii) inefficiency;
- (iii) neglect of duty;
- (iv) malfeasance; or
- (v) a felony or conduct involving moral turpitude.²³⁷

These procedures resemble certain aspects of those at issue in both *Myers* and *Humphrey's Executor*, and differ from each in other respects. Like the postmaster statute in *Myers* and unlike the FTC Act in *Humphrey's Executor*, Congress has a formal role in removing the Comptroller General. But like the FTC Act and unlike the postmaster statute, the grounds for removal are, at least in theory, limited.

This provision was controversial from the very beginning because it gave the President a subordinate role in the removal process. The position of Comptroller General was established by the Budget and Accounting Act of 1921.²³⁸ The adoption of that law culminated more than a decade of efforts to implement a unified federal budget and to reform the government's financial oversight procedures.²³⁹ Those efforts would have succeeded sooner but for President Wilson's veto of an earlier version of the Budget Act; Wilson specifically objected only to the procedure for removing the Comptroller General. That version provided that Congress could remove the Comptroller General, on the same grounds as those quoted above, by a concurrent reso-

²³⁷ 31 U.S.C. § 703(e)(1) (1982). The omitted clause, subsection (A), specified that the Comptroller General also may be removed through the impeachment process.

²³⁸ Ch. 18, 42 Stat. 20 (codified as amended at 31 U.S.C. §§ 701-779 (1982 & Supp. III 1985)).

²³⁹ The Act created two new agencies to implement the new procedures. The General Accounting Office, headed by the Comptroller General, took over the various financial and accounting responsibilities which until then had been handled by the Comptroller of the Treasury and other executive officials. The Bureau of the Budget was established to help the President prepare a unified national budget. Previously, the various departments and agencies prepared their own budget requests and submitted them to Congress with no overall coordination by anyone in the executive branch. See generally F. MOSHER, THE GAO 17-63 (1979).

lution. Because a concurrent resolution need not be presented to the President for approval or veto, the chief executive would have absolutely no power to dismiss an official whom he had appointed.²⁴⁰ Congress responded by requiring the use of a joint resolution, which must be presented to the President,²⁴¹ and thus assured the chief executive of at least a limited role in the removal process. In that form, the Budget Act was signed by President Harding.²⁴² The constitutional question continued to lurk in the background, however.²⁴³

B. *The Court's Analysis*

The Court in *Bowsher* reasoned that Gramm-Rudman-Hollings authorized the Comptroller to perform duties of an executive nature but that the statute creating the Comptroller's position effectively prevented the President from removing him. In this regard, the opinion's structure is somewhat odd, focusing first upon the removal procedure and then upon the nature of the authority that the Comptroller exercised under the Act. The following discussion proceeds first by examining the functions

²⁴⁰ 59 CONG. REC. 8609-10 (1920). See 7 DESCHLER'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES 343-45 (1977).

²⁴¹ United States v. California, 332 U.S. 19, 28 (1947); 7 DESCHLER'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES 333-34 (1977).

²⁴² The change in the removal provision, the only substantial alteration in the bill that Wilson had vetoed, was made as a gesture to the new President. Harding was much less protective of executive prerogative than his predecessor had been; the switch from concurrent to joint resolution probably would not have satisfied Wilson. H. MANSFIELD, THE COMPTROLLER GENERAL 69-70 (1939); F. MOSHER, A TALE OF TWO AGENCIES 31-32 (1984).

²⁴³ Uncertainty over the validity of the procedure for removing the Comptroller General resurfaced within a few years after President Harding's approval of the Budget and Accounting Act. The *Myers* decision prompted the National Municipal League to commission Professor Corwin's analysis of the broader implications of Chief Justice Taft's opinion out of concern that the opinion called into question the survival of one of the most important reforms embodied in the 1921 law. See E. CORWIN, *supra* note 63, at iii-iv. The fear that judicial invalidation of the removal provision might destroy the GAO and the position of Comptroller General was not entirely unfounded because the Budget and Accounting Act of 1921 contained no severability clause. H. MANSFIELD, *supra* note 242, at 81. The possible unconstitutionality of the removal procedure also drew sporadic scholarly attention in subsequent years. See, e.g., L. JAFFE & N. NATHANSON, *supra* note 189, at 162; Note, *The Comptroller General of the United States: The Broad Power To Settle and Adjust All Claims and Accounts*, 70 HARV. L. REV. 350, 351 n.12 (1956).

that the statute delegated and then by evaluating the removal procedure.

1. *Characterizing the Comptroller General's Authority*

Synthesizing the holdings of *Myers* and *Humphrey's Executor*, Chief Justice Burger concluded that "Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment."²⁴⁴ The duties that Gramm-Rudman-Hollings assigned the Comptroller General "plainly entail[ed] execution of the law in constitutional terms."²⁴⁵ Those duties, which included the preparation of a report projecting federal revenues and expenditures and the promulgation of legally binding spending reductions on a program-by-program basis, required this official to interpret and to implement legislation enacted by Congress. The interpretation and implementation of statutes represented "the very essence of 'execution' of the law."²⁴⁶

This analysis is consistent with the temporal definition of the respective roles of the political branches in the most important recent separation-of-powers decision, *INS v. Chadha*.²⁴⁷ Invalidating the legislative veto in *Chadha*, the Chief Justice explained that implementing a duly enacted statute is the province of the executive branch; Congress may countermand such action or alter the underlying policy only by passing new legislation.²⁴⁸

Chadha's reasoning implies that reducing expenditures for specific federal programs in order to reduce the deficit is an intrinsically executive function. The *Bowsher* opinion, however, clearly was not intended to reach so far. The Act contained a fallback provision under which Congress would vote for the necessary spending reductions if a court invalidated the automatic budget-cutting mechanism.²⁴⁹ Since Congress would perform the Comptroller's tasks in those circumstances, and since

²⁴⁴ 106 S. Ct. at 3188.

²⁴⁵ *Id.* at 3192.

²⁴⁶ *Id.*

²⁴⁷ 462 U.S. 919 (1983).

²⁴⁸ *Id.* at 954-55, 958.

²⁴⁹ See *supra* text accompanying note 45.

any branch "presumptively exercis[es] the power the Constitution has delegated to it" when it takes any action,²⁵⁰ congressional implementation of Gramm-Rudman-Hollings under the fallback provision presumably is a legislative action. If implementing the Act is a purely executive function, the fallback procedure would be unconstitutional under this analysis. The *Bowsher* Court, however, found the presence of the fallback provision dispositive when it invalidated the Comptroller General's duties under Gramm-Rudman-Hollings instead of the removal procedure contained in the Budget and Accounting Act of 1921.²⁵¹

The existence of the fallback mechanism suggests that the powers in question could be viewed as legislative rather than executive. Under the Court's analysis, congressional action to impose widespread, program-by-program spending reductions would be presumptively legislative in nature. Ignoring the identity of the actor, one could regard the same action undertaken by the Comptroller General, or by anyone else Congress might designate, in precisely the same fashion. The person or agency assigned this function would be a delegate of the legislature. Although the proposition that Congress may not delegate the legislative power has ancient roots,²⁵² the Court has upheld virtually every such delegation on record, even while reciting pla-

²⁵⁰ 462 U.S. at 951.

This presumption is based upon the erroneous assertion that the Constitution defines legislative, executive, and judicial powers. See Elliott, *INS v. Chadha: The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125, 132-33.

²⁵¹ 106 S. Ct. at 3192-93.

The reprieve that the removal provision gained in *Bowsher* may prove only temporary. Another pending case squarely presents the question whether, in light of the removal provision, the Comptroller General may perform the arguably executive duties assigned to him under the Competition in Contracting Act, Pub. L. No. 98-369, § 2741(a) 98 Stat. 494, 1199-203 (1984) (codified as amended at 31 U.S.C. §§ 3551-3556 (Supp. III 1985)). That statute contains no analogous fallback provision. Thus, this case could require the court either to invalidate the removal provision or to render the Competition in Contracting Act completely ineffective. *Ameron, Inc. v. U.S. Army Corps of Eng'rs*, 787 F.2d 875 (3d Cir.), *on reh'g*, 809 F.2d 979 (3d Cir. 1986), *reh'g en banc denied*, Nos. 85-5226 & 85-5377 (3d Cir. Feb. 27, 1987).

²⁵² See, e.g., *Field v. Clark*, 143 U.S. 649, 692 (1892).

titudinal condemnations of the practice.²⁵³ If this alternative view is correct, then Gramm-Rudman-Hollings should be evaluated under the nondelegation doctrine. That doctrine focuses upon the delegability of the function, the standards embodied in the delegation, and the competence of the delegate.²⁵⁴ The procedure for removing the delegate becomes, if not entirely irrelevant, then at least distinctly secondary in significance.²⁵⁵

In the end, no logically compelling basis exists to prefer either characterization of the Comptroller General's duties under the Act. The Court labeled the duties as executive, although it as easily could have described them as legislative. This does not mean that the majority made an incorrect choice, only that it made an arbitrary one.²⁵⁶ The question remains, however, whether the removal procedures infringe so severely upon presidential authority as to disqualify the Comptroller from exercising what the Court deemed executive responsibilities.

2. *The Validity of the Removal Provision*

The majority opinion read the removal provision as authorizing Congress alone to dismiss the Comptroller General. Since the action must be taken by means of a joint resolution, the initiative for discharge belongs to the legislature. Moreover, while the President may veto a joint resolution, both houses of Congress could override the veto by a two-thirds majority, thereby effecting the Comptroller General's removal even over the chief executive's objection.²⁵⁷

The Court drew what it saw as an obvious conclusion from this arrangement: because only Congress could fire the Comp-

²⁵³ The only exceptions to this pattern occurred more than 50 years ago. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935).

²⁵⁴ See *infra* Part V.

²⁵⁵ Justice Stevens took a somewhat similar position in his separate opinion. See 106 S. Ct. at 3194-96 (Stevens, J., concurring in the judgment). The existence of the two alternative methods of implementing the statute prompted him to characterize the duties in question as "chameleon-like" and to label them as "legislative." *Id.* at 3201 (Stevens, J., concurring in the judgment).

For a critical discussion of other aspects of Justice Stevens' position, see *infra* notes 339-47 and accompanying text.

²⁵⁶ See Elliott, *supra* note 250, at 135.

²⁵⁷ 106 S. Ct. at 3189 & n.7.

troller General, only Congress could control him.²⁵⁸ Quoting the district court, the Chief Justice said that placing the exclusive removal authority in the legislative branch meant that it was only that branch which the Comptroller "must fear and, in the performance of his functions, obey." ²⁵⁹ In short, the removal procedure rendered the Comptroller General "subservient to Congress" in fulfilling his duties under Gramm-Rudman-Hollings.²⁶⁰ Such subservience of an official performing executive functions was constitutionally impermissible.²⁶¹

Although this last point is indisputable, it is far from clear that such subservience actually existed in this case. First, the President's role in removing the Comptroller General is likely to be considerably larger than the majority suggests. Even if he lacks the formal authority to initiate a removal, every chief executive has a large corps of loyal supporters in both houses of Congress. Any President who wants to fire a Comptroller will have no trouble finding cooperative legislators to introduce the required joint resolution.

Second, the difficulty of mustering the required two-thirds majority to override a presidential veto of a removal resolution makes the prospect of a runaway Congress very remote. Since the Constitution mandates only a simple majority in the House, impeaching the Comptroller General—or the President himself—requires fewer votes than does overriding a veto. Similarly, simply passing an alternative package of spending cuts also takes fewer votes—simple majorities in both chambers—than does dismissing the Comptroller over executive opposition.

Third, the language of the removal provision limits the grounds for dismissing the Comptroller General. While those grounds are not as narrow as the grounds for impeachment, they are not so broad as to encompass entirely arbitrary or whimsical reasons. Indeed, the statutory assurance of a pretermination hearing suggests that ousting the Comptroller General would present a formidable challenge.

²⁵⁸ *Id.* at 3189.

²⁵⁹ *Id.* at 3188 (quoting 626 F. Supp. at 1401).

²⁶⁰ *Id.*

The district court went further, finding that the removal procedure "create[d] . . . here-and-now subservience to another branch." 626 F. Supp. at 1392.

²⁶¹ 106 S. Ct. at 3188-89.

Finally, the nature of the Comptroller General's office militates against a precipitous removal over the President's opposition. Because the Comptroller performs many functions for Congress under a variety of statutes that are entirely unrelated to Gramm-Rudman-Hollings,²⁶² the legislative branch has little incentive to discharge him for other than the most serious reason. Indeed, since the creation of the office in 1921, no Comptroller has been removed or even threatened with removal.²⁶³ Further, the Comptroller lacks incentive to trim his sails in hopes of retaining his position; by statute, he may serve a single, fifteen-year term with no possibility of reappointment.²⁶⁴

Moreover, as a practical matter, the threat of removal is a much less effective means for controlling the Comptroller General than numerous other, more subtle devices available to Congress. For example, the legislative branch could abolish the office altogether, though that prospect seems unlikely for the reasons stated in the preceding paragraph. More realistically, Congress may lower the Comptroller's salary, reduce his staff, or move his office to South Succotash.²⁶⁵ Any or all of these steps might induce the Comptroller to resign, even if the President earnestly desired that he remain on the job. Thus, if the Comptroller General is subservient to Congress, his subservience is unrelated to the statutory removal procedure.

²⁶² See *id.* at 3196-98 (Stevens, J., concurring in the judgment) (discussing statutory duties of Comptroller General).

²⁶³ It is particularly striking that no action was taken against the Comptroller General in the years between *Myers* and *Humphrey's Executor*, when the President seemed to have unchallengeable authority to fire anyone he had appointed. During this period, the Comptroller had bitter disputes with several cabinet members yet emerged with his position entirely secure against executive wrath. H. MANSFIELD, *supra* note 242, at 76.

²⁶⁴ 31 U.S.C. § 703(b) (1982).

Professor Mosher notes that the Comptroller General's 15-year term is the longest fixed tenure enjoyed by any federal officer. F. MOSHER, *supra* note 239, at 242.

²⁶⁵ See *supra* notes 154-56 and accompanying text; *infra* text accompanying note 337.

The possibility that Congress might move an office to oust its director is not entirely hypothetical. An analogous situation arose in 1983, when the executive branch relocated an office in order to retain an agency director. The National Institute for Occupational Safety and Health was transferred to Atlanta because its recently appointed director had refused to move to Washington. There was general agreement that Congress had the legal authority to block the transfer, although legislative efforts to do so proved unsuccessful. Wash. Post, Jan. 14, 1983, at A13.

In fact, the legislative history strongly suggests that the removal procedure was entirely irrelevant to the decision to give the Comptroller General important responsibilities under Gramm-Rudman-Hollings. The subject of removal was not mentioned at all during the debates.²⁶⁶ Instead, members of Congress included the Comptroller because they did not trust the Office of Management and Budget to implement the law in good faith and could not find any other agency to which to entrust that task.²⁶⁷

Admittedly, these considerations, either alone or in combination, may not have sufficient legal significance to refute the

²⁶⁶ 106 S. Ct. at 3218 (Blackmun, J., dissenting).

Despite this legislative oversight, President Reagan specifically questioned the legality of vesting the Comptroller General with authority under Gramm-Rudman-Hollings because of the removal provision in the 1921 Budget Act. Statement on Signing H.J. Res. 372 Into Law, 21 WEEKLY COMP. PRES. DOC. 1490, 1491 (Dec. 12, 1985).

²⁶⁷ Members of both parties, including one of the principal sponsors of the Act, recognized that the OMB, as a presidential agent, was likely to distort its projections of the budget deficit in accordance with the chief executive's wishes. See, e.g., 131 CONG. REC. S12701 (daily ed. Oct. 5, 1985) (remarks of Sen. Rudman) ("We know OMB tends to work for the President and [the Congressional Budget Office], it seems to me, . . . has been more accurate."); *id.* (remarks of Sen. Hart) ("OMB has been cooking its books for 5 years. We have all known that. . . . You have a political estimating operation up the street which cooks its books regularly, and you have the CBO trying to be honest."); *id.* at S13113 (daily ed. Oct. 10, 1985) (remarks of Sen. Byrd) ("the administration can . . . manipulate when the automatic cuts will go into effect if the Office of Management and Budget cooks the numbers"); *id.* at S12897 (daily ed. Oct. 9, 1985) (remarks of Sen. Chiles) ("We . . . know that OMB has never been nonpartisan, whether there was a Democrat as President or a Republican. It has always been an arm and an instrument of the administration."); *id.* at S12754 (daily ed. Oct. 6, 1985) (remarks of Sen. Glenn) (characterizing OMB as "a truly partisan arm of the President" and decrying the "enormous potential for abuse here, in the introduction of partisan budget projections to [s]kew the workings of the bill towards the President's advantage"). The emphasis upon the power of the OMB, which has played a central role in government policymaking in recent years, contrasts sharply with the generally peripheral role that its predecessor, the Bureau of the Budget, played during most of its existence. See Schick, *The Budget Bureau That Was: Thoughts on the Rise, Decline, and Future of a Presidential Agency*, in *THE INSTITUTIONALIZED PRESIDENCY* 93, 95-105 (N. Thomas & H. Baade eds. 1972).

Although the statements quoted above demonstrate that many members would have preferred to vest the implementation of the law in the Congressional Budget Office, such a course would have been clearly unconstitutional under existing precedents. The Director of the CBO is appointed by Congress. 2 U.S.C. § 601(a)(2) (1982). An official so selected may not exercise significant authority pursuant to a public law. *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam). Since implementation of Gramm-Rudman-Hollings unquestionably would have involved the exercise of such authority, the Director of the CBO was legally disqualified from performing those duties. See 106 S. Ct. at 3216 n.1 (Blackmun, J., dissenting).

constitutional conclusion that the majority reached. The presence of presidential loyalists in Congress still requires the chief executive to seek legislative assistance in beginning the process of discharging an official exercising executive power. The difficulty of mustering a two-thirds vote in each house to oust the Comptroller General will not necessarily prevent legislators who cannot agree upon a specific set of budget cuts from taking revenge against the architect of the one specific proposal on the table. Neither the statutory limitation upon grounds for removal nor the provision for a pretermination hearing can assure a legally correct outcome. Congress could act irrationally, or a Comptroller General might alter his judgments to avoid even a minimal likelihood of such an eventuality. Finally, benign congressional intent cannot authorize legislation that violates the Constitution.

Nevertheless, the Comptroller General cannot properly be characterized as subservient to anyone. Respected political scientists agree that this official is as insulated from external pressures as any in the government.²⁶⁸ In real terms, the Comptroller is "practically irremovable."²⁶⁹ Moreover, because the whole purpose of the Gramm-Rudman-Hollings mechanism was to relieve Congress of the unpalatable task of voting for specific expenditure reductions, the notion that the legislative branch might oust the Comptroller General out of pique over his implementation of his duties under the Act verges on the fanciful.

This impressive array of checks minimizing the likelihood of arbitrary, hasty, or ill-considered congressional action against the Comptroller carried no weight with the Chief Justice. "The separated powers of our government," he explained, "can not be permitted to turn on judicial assessment of whether an officer

²⁶⁸ These scholars phrase their conclusions in unusually colorful terms. In the words of Professor Mansfield, "[T]he Comptroller General, once confirmed, is safe so long as he avoids a public exhibition of personal immorality, dishonesty, or failing mentality." H. MANSFIELD, *supra* note 242, at 75-76.

Professor Mosher concludes that, "[b]arring resignation, death, physical or mental incapacity, or extremely bad behavior, the Comptroller General is assured his tenure if he wants it, and not a day more." F. MOSHER, *supra* note 239, at 242 (footnote omitted).

²⁶⁹ F. MOSHER, *supra* note 239, at 4.

As Justice Blackmun put it, "If Congress in 1921 wished to make the Comptroller General its lackey, it did a remarkably poor job." 106 S. Ct. at 3219 (Blackmun, J., dissenting).

exercising executive power is on good terms with Congress.”²⁷⁰ The removal provision left open the possibility that the legislative branch could fire an official performing important executive functions; its very existence posed an unacceptable risk that the official would modify his behavior, perhaps only subconsciously, to avoid dismissal.

One can best understand the Chief Justice’s reasoning by examining his treatment of Justice White’s argument in dissent that the statute prohibits removal at will and that any purported removal by Congress would be subject to judicial review.²⁷¹ The majority noted simply that no one could be sure about the availability of judicial review.²⁷² More significantly, the Chief Justice characterized as an “arguable premis[e]” the notion that the grounds for removal specified in the statute are exclusive.²⁷³ In support of this point, he cited *Shurtleff*, the 1903 decision in which the Court held that the grounds for removal specified in the law creating the position of general appraiser of merchandise could not, in the absence of clear and explicit language, be viewed as barring removal for other reasons, or for none.²⁷⁴

The citation to *Shurtleff* reflected the Chief Justice’s adherence to a very strong separation-of-powers doctrine. If the language in the Budget and Accounting Act is not sufficiently clear and explicit to constrain Congress from firing the Comptroller General only for the reasons expressed, then the legislative branch presumably could fire him for any reason at all. In that event, however, the logic of *Shurtleff* would also mean that the statutory language is ineffective to preclude the President from dismissing the Comptroller General for any reason at all on the familiar theory that the power to remove is incident to the

²⁷⁰ 106 S. Ct. at 3191.

²⁷¹ *Id.* at 3211 (White, J., dissenting).

²⁷² *Id.* at 3190 & n.8.

²⁷³ *Id.* at 3190.

He went on to question whether the statutory limitation to grounds such as “inefficiency” and “malfeasance” in fact operate meaningfully to constrain congressional discretion to fire the Comptroller. These terms may be uncomfortably close to “maladministration,” a basis for impeachment that the framers expressly rejected. *Id.*

²⁷⁴ See *supra* notes 120-23 and accompanying text.

President's power to appoint that official.²⁷⁵ This possibility would not satisfy the Chief Justice even though it would give the President a formal—and unimpeded—role in the removal process. The vice of the statute, from this perspective, is not simply that the chief executive *might* be left out of the process, but rather that Congress has a *direct* role in the dismissal of an officer exercising executive power. Legislative participation in such a removal, other than through impeachment, is exactly what *Myers* prohibits.²⁷⁶

So viewed, *Bowsher* is an easy case.²⁷⁷ The result follows directly from the leading case and is fully consistent with the language of more recent precedents concerning the removal power. Yet the majority opinion strikingly fails to address almost all of the arguments that, due to the checks and balances built into the Budget and Accounting Act and the realities of politics in contemporary Washington, the Comptroller General is not in fact subservient to Congress. To the extent that the majority responded to these arguments, its reasoning has a marked *ipse dixit* quality. The analysis reflects none of the sensitive assessments of one branch's intrusion into the responsibilities of another that have marked other important separation-of-powers decisions. For example, the Court did not inquire into "the

²⁷⁵ The President selects the Comptroller General from a list of three persons recommended by the Speaker of the House and the President *pro tempore* of the Senate. 31 U.S.C. § 703(a)(2) (1982). The propriety of this procedure was not at issue in the *Bowsher* litigation.

²⁷⁶ 106 S. Ct. at 3188, 3190-91. See *supra* notes 207-15 and accompanying text.

From this perspective, it is entirely irrelevant that the statutory restriction upon the grounds for removal, if effective to limit congressional discretion, could be seen as enhancing the Comptroller General's independence from legislative control. See 106 S. Ct. at 3195 (Stevens, J., concurring in the judgment); *id.* at 3211 (White, J., dissenting).

²⁷⁷ Even Justice White, who criticized the majority for relying upon "the rigid dogma" that the Constitution prohibits Congress from participating directly in the removal of officers who perform executive duties, 106 S. Ct. at 3214 (White, J., dissenting), previously had found nothing in the precedents suggesting that Congress "*itself* [could] . . . remove [members of regulatory agencies] without the participation of the Executive Branch of the Government." *Buckley v. Valeo*, 424 U.S. 1, 277 (1976) (White, J., concurring in part and dissenting in part) (emphasis in original). On this reasoning, *Bowsher* should have been an *a fortiori* case because, by Justice White's own admission, the officer in question was executing a law that Congress had passed. See 106 S. Ct. at 3208 (White, J., dissenting). That *Bowsher* was not such a case for Justice White suggests an underlying complexity to the problem that the majority opinion, even if it reached the correct result, managed to ignore.

extent to which [the removal provision] prevents the Executive Branch from accomplishing its constitutionally assigned functions,"²⁷⁸ nor did it consider whether maintenance of a unitary executive requires "an absolute, unqualified" exclusion of Congress from the removal process.²⁷⁹ Further, the opinion reflects no serious effort to balance the competing interests of the legislative and executive branches.²⁸⁰ Therefore, however correct its conclusion, the Court's analysis reveals a "distressingly formalistic view of separation of powers."²⁸¹ This is the more unfortunate because no textual provision expressly addresses the issue at hand; *Bowsher* required the interpretation of one of the "great silences of the Constitution."²⁸²

The point, in brief, is not that the decision necessarily is wrong, but simply that it is unpersuasive. No one suggests that the Court abstain from resolving disputes over the removal power.²⁸³ In light of the magnitude of the legislation involved in the case, however, one might have hoped for a more sophisticated explanation of the reasons for the Court's disposition of the issues before it. At the same time, those who may be disappointed by the quality of the opinion at least may take some

²⁷⁸ *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977).

²⁷⁹ *United States v. Nixon*, 418 U.S. 683, 706 (1974).

²⁸⁰ See, e.g., *id.* at 707-13; *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-55 (1952) (Jackson, J., concurring).

²⁸¹ 106 S. Ct. at 3205 (White, J., dissenting).

²⁸² *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 535 (1949).

²⁸³ Even Justice White, who attacked the Chief Justice's analysis at almost every turn, would have held only that separation-of-powers disputes, such as the wisdom of conferring executive powers upon an official removable by joint resolution or of authorizing an unelected official to make binding cuts in the federal budget, were "*for the most part* to be worked out between Congress and the President through the legislative process." 106 S. Ct. at 3214 (White, J., dissenting) (emphasis added). Unfortunately, Justice White did not explain the meaning of his qualification; he suggested only that this was an inappropriate case for judicial resolution because he could see "no real danger of aggrandizement of congressional power." *Id.*

Dean Choper, the foremost academic advocate of judicial abstention from separation-of-powers disputes, nonetheless would have the courts award compensation to officials who were wrongfully ousted from their positions. He simply would leave the resolution of the issue of constitutional power to remove to political accommodation. J. CHOPER, *supra* note 24, at 331-33. It is not entirely clear how the judiciary could avoid at least an implicit ruling on the underlying constitutional question, since an award of back salary would require a prior determination that the discharged official was entitled to remain in office.

consolation from the Chief Justice's refusal to accept the broadest argument made by the executive branch. That theory, if accepted, would have called into question many of the assumptions upon which the modern administrative state is based.

C. The President, the Removal Power, and the Concept of Administrative Independence

The *Bowsher* decision was awaited with great anticipation in part because it concerned the means by which the federal government could deal with the budget deficit, one of the central political issues of the day. The case had broader ramifications, however, because the executive branch argued that Gramm-Rudman-Hollings was invalid not only because Congress alone could remove the Comptroller General, but also because the President lacked the unfettered authority to discharge an official performing executive functions.²⁸⁴ This argument, which reflects the King's-party philosophy underlying *Myers*,²⁸⁵ coupled with some broad language in the district court's opinion,²⁸⁶ raised questions about the constitutionality of a large number of "independent" agencies. Acceptance of the argument held out the prospect of a significant restructuring of the federal government. Careful analysis suggests two conclusions. First, the concept of genuinely independent administrative agencies oversimplifies reality. Second, statutory provisions at issue in *Bowsher* and *Humphrey's Executor*, which limit the grounds for removing administrators, play a comparatively minor role in affording some agencies relatively greater freedom from political controls than others enjoy and therefore do not violate the Constitution.

1. *The Concept of "Independent" Agencies*

In recent years, it has become commonplace to refer to administrative agencies such as the Federal Trade Commission as "independent." In fact, Congress has formally so characterized some agencies, presumably to contrast them with "execu-

²⁸⁴ See Brief for the United States at 44-51; Reply Brief for the United States at 2-3.

²⁸⁵ See *supra* text accompanying note 170.

²⁸⁶ See *infra* text accompanying note 289.

tive" bodies.²⁸⁷ Although the term "independent agency" appears nowhere in the *Humphrey's Executor* opinion, the concept is derived from Justice Sutherland's statement that the FTC was created as "a body which shall be independent of executive authority, *except in its selection*, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government."²⁸⁸

The district court suggested that the experience of the half-century since those words were written has called into question the assumption that a group of expert administrators can make truly impartial decisions unaffected by political considerations. That court further noted that certain language in *Chadha* is at least arguably inconsistent with the *Humphrey's Executor* analysis.²⁸⁹ While the government cited this language approvingly, it did not press the Court specifically to repudiate Justice Sutherland's reasoning.²⁹⁰ Others have argued, however, that the Constitution prohibits the creation of agencies over which the President lacks direct control and that unfettered removal authority is essential to such control.²⁹¹ The implications of such a drastic step elicited extensive discussion at oral argument in *Bowsher*²⁹² and prompted Chief Justice Burger to add a footnote to his opinion disavowing any intention to cast doubt upon the constitutional status of the independent agencies.²⁹³

²⁸⁷ In addition to the FTC, "independent" agencies include the Securities and Exchange Commission, the Interstate Commerce Commission, the Federal Reserve Board, the Federal Communications Commission, the Nuclear Regulatory Commission, the Federal Maritime Commission, the Federal Energy Regulatory Commission, and the National Labor Relations Board, among others. See 44 U.S.C. § 3502(10) (1982 & Supp. III 1985). Sometimes Congress combines the two terms. For example, the Energy Research and Development Administration is denominated "an independent executive agency." 42 U.S.C. § 5811 (1982).

²⁸⁸ 295 U.S. at 625-26 (emphasis in original).

²⁸⁹ 626 F. Supp. at 1398-99.

²⁹⁰ Brief for the United States at 46 n.32. But see Rabin, *supra* note 181, at 1319 n.471 (citing statements by Attorney General Meese that concept of independent regulatory agencies is inconsistent with separation-of-powers doctrine).

²⁹¹ E.g., Brief for Plaintiffs-Appellants at 39-63, *Ticor Title Ins. Co. v. FTC*, 814 F.2d 731 (D.C. Cir. 1987); Note, *supra* note 235, at 1775, 1777, 1780-81, 1785.

²⁹² This issue was of particular concern to Justice O'Connor. See 54 U.S.L.W. 3710 (1986) (summary of oral argument).

²⁹³ 106 S. Ct. at 3188 n.4. This footnote, however, did not foreclose such a constitutional challenge. The Court simply stated that "[t]his case involves nothing like"

From a strictly analytical perspective, however, it has become increasingly difficult to distinguish independent from executive agencies. Both types of agencies are equally subject to the general provisions of the Administrative Procedure Act.²⁹⁴ Similarly, both types of agencies engage in adjudication, the quasi-judicial function that loomed so large for the Court in *Humphrey's Executor*.²⁹⁵ Moreover, both types of agencies engage in rule-making, which has become the predominant method for the formulation of administrative policy during the past generation.²⁹⁶ Finally, the agencies undertake these activities with the apparent approval of the Supreme Court.²⁹⁷

Even if one could distinguish independent from executive agencies, however, questions respecting the significance of the distinction would remain. Two examples illustrate this point.

statutes permitting removal by the President for specified causes or laws which are silent on the entire subject.

In a case decided the same day as *Bowsher*, the Court implied that the constitutionality of the independent agencies may be somewhat more secure than this ambiguous footnote suggests. That case upheld the authority of the Commodity Futures Trading Commission to adjudicate common-law counterclaims in reparations proceedings even though that body is not an article III tribunal. *CFTC v. Schor*, 106 S. Ct. 3245 (1986). The Commission is "an independent agency of the United States Government." 7 U.S.C. § 4(a)(1) (1982); *see also* 44 U.S.C. § 3502(10) (1982). The CFTC's organic statute does not limit the grounds for removal, however, so *Schor* cannot resolve the constitutional ambiguity left open by the *Bowsher* footnote.

²⁹⁴ The APA defines an "agency" as "each authority of the Government of the United States," subject to certain exceptions that do not implicate the distinction between "independent" and "executive" bodies. 5 U.S.C. § 551(1) (1982).

²⁹⁵ *See, e.g.,* *Consumer Energy Council v. FERC*, 673 F.2d 425, 472 n.198 (D.C. Cir. 1982) ("there has been a general breakdown in any distinction between the functions of the two types of agency"), *aff'd mem. sub nom.* *Process Gas Consumers Group v. Consumer Energy Council*, 463 U.S. 1216 (1983); J. MASHAW, *BUREAUCRATIC JUSTICE* 18 (1983) (noting extensive system of adjudication undertaken by Social Security Administration, located within executive branch as part of Department of Health and Human Services); Nathanson, *supra* note 93, at 1101; Note, *supra* note 235, at 1771-72.

²⁹⁶ *See, e.g.,* *Consumer Energy Council v. FERC*, 673 F.2d 425, 472 n.198 (D.C. Cir. 1982), *aff'd mem. sub nom.* *Process Gas Consumers Group v. Consumer Energy Council*, 463 U.S. 1216 (1983); Nathanson, *supra* note 93, at 1101; Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 376; Strauss & Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 AD. L. REV. 181, 203-05 (1986); Note, *supra* note 235, at 1771-72.

²⁹⁷ *See, e.g.,* *CFTC v. Schor*, 106 S. Ct. 3245 (1986) (upholding agency authority to resolve state-law counterclaims in administrative adjudication proceeding); *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983) (distinguishing administrative rulemaking by agencies from lawmaking that must be performed by Congress).

The National Transportation Safety Board was established as part of the Department of Transportation, an executive department, to investigate accidents and hear various appeals.²⁹⁸ Nine years later, Congress transformed the Board into "an independent agency of the United States" without altering its statutory responsibilities in any way.²⁹⁹ It is not at all clear that this change had any substantive significance on the activities of the Board. More to the point, it is not apparent why the change should have made any legally important difference in the status of the agency.³⁰⁰

²⁹⁸ Department of Transportation Act, Pub. L. No. 89-670, § 5, 80 Stat. 931, 935 (1966).

²⁹⁹ Transportation Safety Act of 1974, Pub. L. No. 93-633, § 303(a), 88 Stat. 2156, 2167 (1975) (codified at 49 U.S.C. App. § 1902(a) (1982)).

³⁰⁰ See S. BREYER & R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 122 & n.81 (2d ed. 1985).

The lower courts generally have looked to the function an official performs rather than to the formal location of the agency in resolving removal disputes that have arisen since *Humphrey's Executor*. See, e.g., *Morgan v. TVA*, 115 F.2d 990, 994 (6th Cir. 1940), cert. denied, 312 U.S. 701 (1941); *Martin v. Reagan*, 525 F. Supp. 110, 113 (D. Mass. 1981) (member of advisory board of National Institute of Justice); *Borders v. Reagan*, 518 F. Supp. 250, 255-64 (D.D.C. 1981) (member of District of Columbia Judicial Nominating Commission), vacated as moot, 732 F.2d 181 (D.C. Cir. 1982); *Lewis v. Carter*, 436 F. Supp. 958, 961 (D.D.C. 1977) (member of Equal Employment Opportunity Commission); *Farley v. United States*, 134 Ct. Cl. 672, 674, 139 F. Supp. 757, 758 (United States marshal), cert. denied, 352 U.S. 891 (1956). Cf. *Nader v. Bork*, 366 F. Supp. 104, 107-09 (D.D.C. 1973) (declaring unlawful the discharge of Archibald Cox as Watergate Special Prosecutor on grounds that the attorney general rather than the President had appointed Cox and that his discharge violated valid regulation promulgated by the attorney general limiting grounds for removal to "extraordinary impropriety," grounds which had not been asserted in this instance).

Morgan was a suit for back pay arising from President Roosevelt's removal of the chairman of the board of the TVA who refused either to withdraw allegations of corruption against fellow board members or to assist in the resolution of the resulting controversy that had brought the board to a standstill. See L. FISHER, *supra* note 61, at 79; C. ROSSITER, *supra* note 236, at 21. The statute creating the TVA, adopted after *Myers* but before *Humphrey's Executor*, provided for removal of board members by concurrent resolution of Congress at any time or, only in cases involving unlawful hiring on the basis of political patronage, by the President. The court of appeals avoided resolution of the constitutionality of these removal provisions by holding the TVA to be an essentially executive agency, thereby distinguishing *Humphrey's Executor* and bringing the case within the *Myers* rule permitting the President to dismiss executive officers. For criticism of this decision, see Larson, *Has the President an Inherent Power of Removal of His Non-Executive Appointees?*, 16 TENN. L. REV. 259 (1940).

Farley also rejected a claim for back pay by a federal marshal whom the President removed before the end of his statutory term. The court held that the marshal performed

The uncertain meaning of administrative independence is further exemplified by the United States Commission on Civil Rights. This agency was established "in the executive branch of the Government" by the Civil Rights Act of 1957.³⁰¹ The statute did not specify how long members would serve and said nothing about removal. When President Reagan attempted to replace three members of the Commission in 1983, numerous critics charged that he was interfering with the agency's independence.³⁰² Two of the affected Commissioners secured a temporary

wholly executive functions of a ministerial nature and thus could be dismissed without formal cause. One of the government lawyers in this case, by the way, was then-Assistant Attorney General Warren Burger. Neither the various opinions nor any of the parties and *amici curiae* cited this decision in *Bowsher*. See also *supra* note 227 (discussing the Chief Justice's involvement in *Wiener*).

In each of the other cases, officials sought to enjoin their dismissal. In *Martin*, the district court denied an injunction against the discharge of a member of a Department of Justice advisory board. Instead, the court granted the government's motion for summary judgment because the board performed purely executive functions. Similarly, in *Lewis*, the district court denied an injunction that would have allowed a member of the EEOC whose term had expired to retain his office until his successor had qualified. The court emphasized that the Commission's limited quasi-legislative and quasi-judicial functions were insufficient to justify equitable relief.

Only in *Borders* was an injunction granted to prevent removal. The district court emphasized that the agency in question was responsible for recommending persons for appointment as judges and that the structure and legislative history of the relevant statute demonstrated congressional intent to insulate the local courts in the District of Columbia from political pressure. Ironically, this case was rendered moot when the plaintiff resigned his office following his conviction for conspiracy to bribe a federal judge. Wash. Post, Apr. 2, 1982, at A16.

One exception to the focus upon the functions performed by the agency involved the unsuccessful effort of two members of the Benefits Review Board to prevent their ouster. In that case, the court placed some significance upon the location of the agency, a part of the Department of Labor, in the executive branch. *Kalaris v. Donovan*, 697 F.2d 376, 395 (D.C. Cir.), *cert. denied*, 462 U.S. 1119 (1983). At the same time, the court underscored that the Secretary of Labor, not the President, appointed the members of the Benefits Review Board, thereby rendering them inferior officers, and that the statute under which they were appointed did not fix the term of their service. Thus, this case was analogous to *Shurtleff*. 697 F.2d at 396, 398. The court conceded that the members of the Board performed adjudicative functions but ruled that this fact alone did not require that they be insulated from all political supervision. Whether these officials could render appropriately impartial judgments presented a question of due process for litigants, not an issue of separation of powers that warranted an injunction protecting the members of the Board from dismissal. *Id.* at 399 n.21.

³⁰¹ Pub. L. No. 85-315, § 101(a), 71 Stat. 634.

³⁰² See, e.g., *Presidential Nominations to the Civil Rights Commission: Hearings Before the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 31, 32 (1983) (statement

injunction to block their dismissal, although the litigation was overtaken by events.³⁰³

The argument that the Commission was independent rested in large part upon various statements in the legislative history.³⁰⁴

of Sen. Biden); *id.* at 33, 35 (statement of Sen. Metzenbaum); *id.* at 37-38 (statement of Sen. Leahy); *id.* at 40-41 (statement of Sen. DeConcini); *id.* at 54, 56 (statement of Rep. Garcia); *id.* at 57-58 (statement of Rep. Richardson); *id.* at 68 (statement of Rep. Dixon); *id.* at 174-75, 176, 177-78 (statement of Judy Goldsmith, president, National Organization for Women); *id.* at 180-81, 182 (statement of Arnoldo Torres, national executive director, League of United Latin American Citizens); *id.* at 195-96 (statement of Arkee Byrd, staff attorney, Women's Legal Defense Fund); *id.* at 196, 198-99, 201 (statement of Joaquin Avila, president, Mexican American Legal Defense and Educational Fund); *id.* at 204, 205-06, 207 (statement of Joseph L. Rauh, Jr.); *id.* at 209, 210-11 (statement of Maudine Cooper, vice-president, National Urban League); *id.* at 219, 220, 221, 455 (statement of Sen. Kennedy); *id.* at 271 (statement of Julius L. Chambers, president, NAACP Legal Defense and Educational Fund); *id.* at 279 (statement of Diann Rust-Tierney, staff attorney, National Women's Law Center); *id.* at 287 (statement of Leonel Castillo, National Association of Social Workers); *id.* at 293, 294 (statement of Martha Escutia, legislative director, National Council of La Raza); *id.* at 306, 312, 318, 320 (statement of William L. Taylor); *id.* at 348, 349 (statement of Virginia Apuzzo, executive director, National Gay Task Force); *id.* at 353, 358 (statement of Stephen M. Levinson, National Association of Human Rights Workers); *id.* at 362 (statement of John H. Buchanan, Jr., People for the American Way); *id.* at 366 (statement of Joyce B. Hamlin, Women's Division, Department of Economic and Social Justice, Methodist Church); *id.* at 369 (statement of Faith Evans, Office of Church in Society and Commission for Racial Justice, United Church of Christ); *id.* at 462 (statement of Sen. Specter); *id.* at 466 (statement of Jan Hartke, director, Washington office, State of New Mexico).

³⁰³ *Berry v. Reagan*, 32 Empl. Prac. Dec. (CCH) ¶ 33,898 (D.D.C.), *vacated as moot*, 732 F.2d 949 (D.C. Cir. 1983). The case became moot when the statutory life of the Commission expired. Congress shortly afterward passed new legislation reconstituting the agency and requiring cause for removal of any of its members. United States Commission on Civil Rights Act of 1983, Pub. L. No. 98-183, 97 Stat. 1301 (codified at 42 U.S.C. §§ 1975-1975f (Supp. III 1985)).

³⁰⁴ The references to the Commission's independence in the legislative history of the 1957 Act involved complaints that the agency would not be subject to congressional control. *See, e.g.*, H.R. REP. NO. 291, 85th Cong., 1st Sess. 53 (Additional Minority Views) (describing Commission as "a body over which we will have no future control"), *reprinted* in 1957 U.S. CODE CONG. & AD. NEWS 1966, 2008; *see also* 103 CONG. REC. 11237 (1957) (remarks of Sen. Johnston) (referring to "an independent commission in the executive branch"); *id.* at 16233 (remarks of Sen. Eastland) ("an independent executive Commission divorced entirely from the control and direction of Congress"). The concept of agency independence derived from *Humphrey's Executor*, however, relates to insulation from presidential control.

The many references to the Commission's independence in this more traditional sense generally appeared in later years. Most of these statements were contained in committee reports recommending authorizations or appropriations for the operation of the agency. *See, e.g.*, 129 CONG. REC. H8843 (daily ed. Oct. 28, 1983) (remarks of Rep.

Unfortunately, these statements do not define this crucial term, and they are contradicted by others characterizing the agency as "executive" or "presidential."³⁰⁵

Another basis for viewing the Commission as independent was its temporary nature. The original statute provided that the agency would cease to exist in two years.³⁰⁶ By analogy to *Wiener*, where the three-year life of the War Claims Commission

Fish); S. REP. NO. 706, 96th Cong., 2d Sess. 2 (1980); H.R. REP. NO. 969, 96th Cong., 2d Sess. 2 (1980); S. REP. NO. 167, 96th Cong., 1st Sess. 2 (1979); H.R. REP. NO. 109, 96th Cong., 1st Sess. 2 (1979); H.R. REP. NO. 1140, 95th Cong., 2d Sess. 2, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 2639, 2640; S. REP. NO. 324, 95th Cong., 1st Sess. 2 (1977); S. REP. NO. 223, 95th Cong., 1st Sess. 2 (1977); S. REP. NO. 1006, 92d Cong., 2d Sess. 3, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 3621, 3623; H.R. REP. NO. 946, 92d Cong., 2d Sess. 2-3 (1972); Letter from Theodore M. Hesburgh to Hon. Carl Albert, Apr. 1, 1971, *reprinted in* S. REP. NO. 293, 92d Cong., 1st Sess. 3 (1971); H.R. REP. NO. 179, 92d Cong., 1st Sess. 2 (1971); H.R. REP. NO. 1339, 91st Cong., 2d Sess. 1-2, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 4772, 4772; S. REP. NO. 704, 90th Cong., 1st Sess. 2, 9, *reprinted in* 1967 U.S. CODE CONG. & AD. NEWS 2178, 2178, 2184; H.R. REP. NO. 389, 90th Cong., 1st Sess. 1 (1967). Others were found in reports investigating alleged irregularities in the performance of the Commission or its staff and in confirmation hearings for Commission nominees. *See, e.g.,* S. REP. NO. 439, 87th Cong., 1st Sess. 2 (1961) [hereinafter 1961 SENATE REPORT]; *Members of the Commission on Civil Rights: Hearings Before the Senate Comm. on the Judiciary*, 85th Cong., 2d Sess. 9 (1958) (remarks of Sen. McClellan) ("This Commission, when established, becomes its own boss. . . . I thought this was to be an independent commission.").

How much interpretive weight these later statements deserve is unclear. In general, the Supreme Court has discounted such post-enactment legislative history. *See, e.g.,* *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 758 (1979); *United States v. Price*, 361 U.S. 304, 313 (1960). Nevertheless, the Court occasionally has found some value in such material, particularly when the intent of the enacting Congress was ambiguous. *See, e.g.,* *Bell v. New Jersey*, 461 U.S. 773, 784 (1983); *Seatrains Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980).

³⁰⁵ *See, e.g.,* 103 CONG. REC. 8663 (1957) (remarks of Rep. Dingell) ("the President's commission"); *id.* at 8847 (remarks of Rep. Forrester) ("a Presidential commission"); *id.* at 13458 (remarks of Sen. Kefauver) (contrasting the "[g]reater independence" of a commission located in the legislative branch than of the "purely executive agency" proposed by the ultimately enacted bill); *id.* at 13726 (remarks of Sen. Talmadge) ("an executive agency"); *id.* at 13729 (remarks of Sen. Javits) (a "Presidential Commission"); *id.* at 13835 (remarks of Sen. Stennis) ("a part of the executive branch of the Government"); *id.* at 13870 (remarks of Sen. Potter) ("a President's Commission"); *id.* at 16233 (remarks of Sen. Eastland) ("a roving Presidential Commission"). *See also* H.R. REP. NO. 2187, 84th Cong., 2d Sess. 30 (1956) (Additional Minority Views) (characterizing Commission proposed in bill that served as model for legislation enacted by the following Congress as "purely executive").

³⁰⁶ Civil Rights Act of 1957, Pub. L. No. 85-315, § 104(b)-(c), 71 Stat. 634, 635.

was regarded as evidence of congressional intent to restrict the President's power to remove, the short term provided for the Civil Rights Commission was invoked against unfettered executive discretion to remove.³⁰⁷ Congress, however, repeatedly extended the life of the Commission over the next quarter-century and, when the removal controversy erupted, was considering another long-term extension.³⁰⁸ Thus, although in form the agency was temporary, as a practical matter it would remain in operation for the foreseeable future.³⁰⁹

A third argument for independence was that the Commission had duties to Congress as well as to the President. Those duties, to recommend appropriate changes in federal law, were essentially the same as those that the Court in *Humphrey's Executor* characterized as quasi-legislative. The statute creating the Civil Rights Commission differed significantly, however, from the one establishing the Federal Trade Commission. The Civil Rights Act of 1957 said nothing about removal, whereas the FTC Act specifically limited the grounds upon which members of the agency could be discharged. The Court in *Humphrey's Executor* identified the FTC's quasi-legislative duties only to explain why Congress constitutionally could so restrict the President. Nothing in the opinion implies that officials who perform such duties must be protected against dismissal without cause.

The silence of the Civil Rights Act of 1957 on the subject of removal made the situation more analogous to *Wiener*, where the statute creating the agency also said nothing about this question, than to *Humphrey's Executor*. The functions performed by the Civil Rights Commission were quite different

³⁰⁷ See *Berry v. Reagan*, 32 Empl. Prac. Dec. (CCH) ¶ 33,893, at 31,307 (D.D.C.), *vacated as moot*, 732 F.2d 949 (D.C. Cir. 1983).

³⁰⁸ See H.R. REP. NO. 197, 98th Cong., 1st Sess. 1-2, *reprinted in* 1983 U.S. CODE CONG. & AD. NEWS 1989, 1989-90.

³⁰⁹ The formally limited existence of the Commission might suggest, however, a restriction upon the otherwise unlimited terms of its members. The district court so reasoned in granting the temporary injunction blocking President Reagan from dismissing two Commissioners in 1983. *Berry v. Reagan*, 32 Empl. Prac. Dec. (CCH) ¶ 33,893, at 31,307 (D.D.C.), *vacated as moot*, 732 F.2d 949 (D.C. Cir. 1983). This reasoning offered little comfort to the plaintiffs in that case because the suit was filed slightly over one month before the Commission was scheduled to go out of existence. See 32 Empl. Prac. Dec. at 31,304. Whether or not the district court correctly analyzed this question, the case became moot when the Commission's life expired. See 732 F.2d at 949.

from those assigned to the War Claims Commission. The Civil Rights Commission was charged only with recommending changes in federal law based upon its research and investigations; it had no authority to adjudicate any matter whatsoever.³¹⁰ Accordingly, concern that presidential intrusion into the workings of the agency might compromise the due process rights of third parties, which played a prominent role in the Court's reasoning in *Wiener*, had much less force in this context.³¹¹ *Humphrey's Executor* suggests that Congress might have limited the grounds upon which the President could remove members of the Commission. The legislative branch did not do so, however. Thus, the argument that members of this agency enjoyed an implied protection against removal without cause is not persuasive.

Finally, the placement of the Civil Rights Commission in the executive branch suggested its lack of independence and therefore implied unfettered presidential removal authority.³¹² Yet the

³¹⁰ *Hannah v. Larche*, 363 U.S. 420, 440-41 (1960).

The original legislation authorized the Commission to investigate sworn, written complaints asserting the denial of voting rights on grounds of race, religion, or national origin, to collect information on legal developments relating to discrimination based upon race, religion, or national origin, and to appraise federal antidiscrimination policies. Subsequently, the Commission's duties were expanded to encompass discrimination based upon age, sex, and handicap and to make the agency a national clearinghouse for information on these matters. Those duties were carried over without change in the 1983 legislation that reconstituted the agency. See 42 U.S.C. § 1975c(a) (Supp. III 1985).

³¹¹ See *supra* notes 229-32 and accompanying text. See also *supra* notes 218-20 and accompanying text; *Hearings, supra* note 302, at 424-31 (statement of Prof. Cass R. Sunstein).

³¹² Past practice suggests that the Commission itself has not been of one view on this subject. All of the Commissioners tendered their resignations when President Kennedy assumed office in 1961 and again when President Johnson succeeded him in 1963. The resignations were rejected, however. F. DULLES, *THE CIVIL RIGHTS COMMISSION: 1957-1965*, at 99, 214-15 (1968). In addition, the agency's first staff director, who had been under fire from congressional opponents of federal civil rights efforts, resigned early in 1961 "with the change of national administrations." 1961 SENATE REPORT, *supra* note 304, at 11. The staff director has always been appointed by the President with the advice and consent of the Senate.

Following the 1964 election, an aide to President Johnson once more sought *pro forma* resignations from the members. All but one of the Commissioners complied. The dissenter, Dean Erwin Griswold of the Harvard Law School, thought that compliance "would be an acknowledgement that we are not an independent agency, but are merely a part of the Presidential staff, holding office at the pleasure of the President. I do not think that that is either the legal or factual situation." Hesburgh, *Integer Vitae: Independence of the United States Commission on Civil Rights*, 46 NOTRE DAME LAW. 445,

political context in which the agency was created militates against a facile conclusion that either Congress or the President even considered the question of removal. Before the 1957 Act which created the Commission, no federal civil rights law had been adopted since 1875.³¹³ Several proposals for a federal civil rights commission had been rejected in the immediately preceding years.³¹⁴ Supporters of civil rights legislation wanted to pass almost any bill at all, no matter how mild and ineffectual, and regarded creation of the Commission as a reasonable first step toward their eventual goal of a comprehensive statute.³¹⁵ Proponents were especially concerned that the Commission would be undermined or destroyed unless it could be insulated from

454 (1971). Only two of the six members of the Commission resigned when President Nixon took office. In 1972, however, Father Hesburgh tendered his resignation in response to a presidential request.

³¹³ Between 1933 and 1956, numerous civil rights bills were introduced in Congress but none passed. See 103 CONG. REC. 13893-94 (1957) (remarks of Sen. Knowland) (listing disposition of every civil rights proposal from 73d to 84th Congresses).

³¹⁴ For example, the year before, the House passed a bill that would have created such a commission. 102 CONG. REC. 13999 (1956). The bill was referred to the Senate Judiciary Committee, *id.* at 13937, which was chaired by Sen. James Eastland, a staunch segregationist, and well-populated with other similarly disposed members who made the Committee "the graveyard of civil rights legislation." C. & B. WHALEN, *THE LONGEST DEBATE* 4 (1985). Not surprisingly, no further action was taken on the House bill. H.R. REP. NO. 291, 85th Cong., 1st Sess. 3 (1957). See generally J. ANDERSON, EISENHOWER, BROWNELL, AND THE CONGRESS 45-109 (1964).

President Truman unsuccessfully sought passage of a similar statute in 1948. H.R. Doc. No. 516, 80th Cong., 2d Sess., reprinted in 94 CONG. REC. 927, 928 (1948).

³¹⁵ See, e.g., 103 CONG. REC. 8488 (1957) (remarks of Rep. Chudoff); *id.* (remarks of Rep. Machrowicz); *id.* at 8498 (remarks of Rep. Keating); *id.* at 8499 (remarks of Rep. Rodino); *id.* at 8651 (remarks of Rep. Vanik); *id.* at 9391 (remarks of Rep. Dollinger); *id.* at 12878 (remarks of Sen. Jackson); *id.* at 13462 (remarks of Sen. McNamara); *id.* at 13727, 13867, 13879 (remarks of Sen. Javits); *id.* at 13731 (remarks of Sen. Carroll); *id.* at 13738 (remarks of Sen. O'Mahoney); *id.* at 13832 (remarks of Sen. Neuberger); *id.* at 13833 (remarks of Sen. Murray); *id.* at 13841 (remarks of Sen. Aiken); *id.* at 13841-42 (remarks of Sen. Douglas); *id.* at 13842-43 (remarks of Sen. Francis Case); *id.* at 13851 (remarks of Sen. Humphrey); *id.* at 13854 (remarks of Sen. Bush); *id.* at 13867 (remarks of Sen. Clifford Case); *id.* at 13873 (remarks of Sen. Watkins); *id.* at 13877 (remarks of Sen. Hruska); *id.* at 13883 (remarks of Sen. Allott); *id.* at 13884 (remarks of Sen. Purtell); *id.* at 13885 (remarks of Sen. Cooper); *id.* at 16088 (remarks of Rep. Brown); *id.* at 16089 (remarks of Rep. Celler); *id.* at 16093 (remarks of Rep. Scott); *id.* at 16099 (remarks of Rep. Diggs); *id.* (remarks of Rep. Roosevelt); *id.* at 16101 (remarks of Rep. Laurence Curtis); *id.* at 16110 (remarks of Rep. Boland); *id.* at 16111 (remarks of Rep. O'Hara).

direct attacks by hostile members of Congress.³¹⁶ Placement of the agency in the executive branch thus was a tactic entirely unrelated to the issue of presidential removal authority.³¹⁷

The political decision concerning the location of the Civil Rights Commission supports the observation of the district court in the Gramm-Rudman-Hollings litigation that "independence from the President . . . entail[s] correspondingly greater dependence upon the committees of Congress to which they are then immediately accountable."³¹⁸ For example, Congress consistently has refused to make the Commission permanent, thereby requiring the agency periodically to justify its existence.³¹⁹ Similarly, the Commission has been subjected to unusually stringent

³¹⁶ See, e.g., *id.* at 13459 (remarks of Sen. Dirksen); *id.* (remarks of Sen. Javits).

The defeat of numerous prior civil rights bills through parliamentary maneuvering and delay made this a well-founded concern. See *supra* note 313. Subsequent attacks upon the Commission and its staff by congressional opponents also justified those concerns. See, e.g., F. DULLES, *supra* note 312, at 22-26, 64, 81-85, 101-03, 192-93, 218-19.

³¹⁷ The question of authority to dismiss members of the Commission was not mentioned anywhere in the legislative history of the 1957 Act. The only reference to the issue in the debate on the 1956 bill, upon which the original version of the 1957 Act was based, was the following statement made in the course of a discussion of the procedural rules under which the Commission would operate:

[T]here is a difference between the rules which are offered for a legislative committee and the rules which are offered for a committee of the administrative branch of the Government. In the first place, these men are appointed by the President, and *any time they did not conform to fair play and fair rules the President undoubtedly would remove them.*

102 CONG. REC. 13179 (1956) (remarks of Rep. Roosevelt) (emphasis added). The context of this statement makes it unclear whether the speaker thought that the President would have plenary authority to remove Commissioners for any reason or that failure to "conform to fair play and fair rules" would constitute cause for removal.

³¹⁸ 626 F. Supp. at 1398.

Additional support for this proposition may be gleaned from the recent experience of the Federal Trade Commission. Over the past decade, largely due to dissatisfaction with the policies of the agency, Congress has subjected the FTC to a variety of stringent procedural and substantive restrictions. See, e.g., Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (codified as amended in scattered sections of 15 U.S.C. (1982 & Supp. III 1985)). At one point, the agency was required to shut down briefly until additional funds were appropriated for its operations. See generally Baer, *Where to From Here: Reflections on the Recent Saga of the Federal Trade Commission*, 39 OKLA. L. REV. 51, 53-54 (1986); Gellhorn, *The Wages of Zealotry: The FTC Under Siege*, REGULATION, Jan.-Feb. 1980, at 33.

³¹⁹ The current extension expires on November 30, 1989. See 42 U.S.C. § 1975f (Supp. III 1985).

procedural requirements applicable to few, if any, other agencies.³²⁰ These considerations strongly suggest that the meaning of the concept of independence remains murky and that its significance for any particular agency may be considerably exaggerated. Whether they also support suggestions that *Humphrey's Executor* be reconsidered remains to be seen.

2. *The Significance of the Removal Power*

The preceding discussion suggests the evanescence of the distinction between independent and executive agencies. That in turn implies that there should be no special principles governing the removal of members of the so-called independent agencies. This conclusion, however, does not define what general principles should govern removals from functionally identical positions.

The view that the Constitution requires that the President have an absolutely free hand in dismissing all of his nonjudicial appointees rests upon an expansive conception of presidential power. Since the Constitution established a unitary executive, the theory goes, the President is entitled to exercise every aspect of executive power, either personally or through agents and subordinates who are responsible to him personally. Moreover, it is "the power of removal—the 'gun behind the door'—that makes it possible for the President to bend his 'team' to his will."³²¹ And because the chief executive is exclusively responsi-

³²⁰ The most notable of these restrictions relates to the Commission's powers of compulsory process. This provision prohibits the agency from issuing any subpoena requiring a witness to attend a hearing or to produce documents more than 50 miles from that person's home or principal place of business. The 50-mile limitation is waived only if the place of testimony or production is located within the target's home state. 42 U.S.C. § 1975a(k) (Supp. III 1985). This restriction was adopted as a compromise measure to promote passage of the original bill, 103 CONG. REC. 8866 (1957) (remarks of Reps. Keating and Celler), and has remained on the books. By contrast, most agencies may require attendance of witnesses and production of documents at any designated place in the country. See, e.g., 7 U.S.C. §§ 499m(b), 2115, 2717 (1982) (Department of Agriculture); 12 U.S.C. § 1818(n) (1982) (Federal Deposit Insurance Corp.); 15 U.S.C. §§ 77s(b), 77uuu(a), 78u(b), 79r(c), 80a-41(b), 80b-9(b) (1982) (Securities and Exchange Commission); 47 U.S.C. § 409(f) (1982) (Federal Communications Commission); 49 U.S.C. § 10321(c)(1) (1982) (Interstate Commerce Commission).

³²¹ C. ROSSITER, *supra* note 236, at 20.

ble for the actions of these officials, he must have the sole and unbridled power to dismiss them.

As an empirical proposition, however, this model of presidential power is dubious. For example, numerous officials within the executive branch exercise their authority pursuant to statutes which insulate their decisions from presidential direction or interference, while others are protected effectively against removal by virtue of their strong political support in Congress or among powerful interest groups.³²² Moreover, no President has succeeded in imposing uniform direction over the executive branch.³²³ This failure has resulted, somewhat paradoxically, from the growth of the executive branch itself, including the White House staff, the Executive Office of the President, and new and existing agencies, as well as from increasingly frequent statutory limitations upon executive action.³²⁴ Finally, advocates of broad presidential power often overlook the political advantages to the chief executive of leaving minor or potentially controversial decisions to others.³²⁵

Although these empirical observations probably were legally irrelevant, it is not at all clear that the existence of statutory removal-for-cause provisions impairs the President's removal authority. No chief executive has ever sought to dismiss for cause any official who enjoyed the protection of such a statute.³²⁶ This fact does not imply necessarily that the existence of such statutes has required Presidents to retain persons whom they found

³²² See S. BREYER & R. STEWART, *supra* note 300, at 123-24; L. FISHER, *supra* note 61, at 98; C. ROSSITER, *supra* note 236, at 246-47.

³²³ R. NEUSTADT, *supra* note 4, at 199-200, 203; C. ROSSITER, *supra* note 236, at 19; W. TAFT, *supra* note 168, at 83-85; Heclo, *One Executive Branch or Many?*, in BOTH ENDS OF THE AVENUE 26, 27 (A. King ed. 1983).

³²⁴ R. NEUSTADT, *supra* note 4, at 30-32, 212-14; Schick, *Politics through Law: Congressional Limitations on Executive Discretion*, in BOTH ENDS OF THE AVENUE 154, 155-61, 166-70 (A. King ed. 1983).

³²⁵ See R. NEUSTADT, *supra* note 4, at 115-16, 200, 211 (observing that Franklin D. Roosevelt benefited from his intuitive understanding of this point, whereas Richard Nixon and Jimmy Carter got themselves into various kinds of difficulty because they failed to appreciate the advantages of decentralized decisionmaking).

³²⁶ Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 955 (1980).

The only recorded instance in which a President has moved against such an official is *Humphrey's Executor*, and in that case the President did not invoke any of the statutory grounds for removal.

unsatisfactory. No President has tried to fire any member of the Federal Communications Commission, the Federal Energy Regulatory Commission, or the Securities and Exchange Commission, although these commissioners have no statutory protection against removal without cause.³²⁷ The explanation is not that members of these agencies consistently have avoided impropriety.³²⁸ Rather, as the controversy over the Civil Rights Commission demonstrates, chief executives incur costs whenever they oust someone, even when no cause need be shown; the nomination of a successor affords congressional and other opponents of the action a forum for criticism.³²⁹ Thus, even if a for-cause requirement theoretically makes removals somewhat more difficult,³³⁰ it does not follow that protection of appointed officials against entirely arbitrary discharge really impairs the authority of the President.³³¹

Moreover, the formal rules governing the power to remove pale into insignificance when compared to the many other re-

³²⁷ W. GELLHORN, C. BYSE & P. STRAUSS, *CASES AND COMMENTS ON ADMINISTRATIVE LAW* 131 (7th ed. 1979).

³²⁸ For example, FCC Commissioner Richard Mack resigned in 1958 following congressional revelation of apparent conflicts of interest between his official duties and his personal financial dealings. See L. FISHER, *supra* note 61, at 96-97; C. ROSSITER, *supra* note 236, at 20.

³²⁹ Accord W. CARY, *POLITICS AND THE REGULATORY AGENCIES* 10 (1967) (noting that "the political inadvisability of such a traumatic step" reduces the efficacy of using removals as a means for asserting presidential control over agencies).

³³⁰ One additional hurdle that a removal-for-cause statute might create is a requirement of a pretermination hearing. The Budget and Accounting Act expressly affords the Comptroller the opportunity for such a hearing. See *supra* text accompanying note 237. Most other removal-for-cause statutes, including the provision of the FTC Act at issue in *Humphrey's Executor*, are silent on this question. Any official whose ouster was predicated upon statutorily defined cause probably would assert a right to such a hearing on the basis of language to that effect in two pre-*Myers* removal cases, see *Shurtleff v. United States*, 189 U.S. 311, 317-18 (1903); *Reagan v. United States*, 182 U.S. 419, 426 (1901), and by analogy to decisions addressing the procedural due process rights of public employees at the state and local level, see, e.g., *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985); *Board of Regents v. Roth*, 408 U.S. 564 (1972). If a pretermination hearing were required, additional questions would remain respecting the formality of the proceeding, the allocation of the burden of proof, and related issues. See Verkuil, *supra* note 326, at 955 & n.73.

³³¹ Some scholars believe that such a requirement may be applied even to members of the cabinet, while others do not. See *supra* note 216. Whatever the answer to that question, it cannot resolve the debate over the constitutionality of adopting removal-for-cause statutes applicable to the members of administrative agencies, whether formally located within the executive branch or not, who do not serve as advisors to the President.

sources that the chief executive can bring to bear to control administrative behavior. At the most basic level, the President has various devices through which he can persuade officials more or less voluntarily to resign.³³² In addition, the power to appoint the members of administrative agencies affords an important means of shaping agency policy, a means Presidents rarely have used.³³³ Other mechanisms available to the chief executive include designation of the chairman of many agencies, control over budget requests, formal or informal involvement in the selection of important agency staff members, introduction of substantive legislation affecting agency jurisdiction and policies, and promulgation of reorganization plans.³³⁴

In short, the substantive importance to the President of unfettered removal authority is modest indeed. The suggestion that removal-for-cause statutes are as suspect under the Constitution as are laws that give Congress a direct role in the removal process is, at best, "not convincing."³³⁵ Indeed, as previously

³³² Presidential requests for resignation are rarely ignored. Even when an initial request is rebuffed, additional White House pressure may prompt an official ultimately to comply. President Ford used this approach to obtain the resignation of a member of the Civil Aeronautics Board in 1975. See L. FISHER, *supra* note 61, at 91-92; W. GELLHORN, C. BYSE & P. STRAUSS, *supra* note 327, at 130 n.6. Members of Congress also may involve themselves, sometimes with the tacit approval of the chief executive, either through embarrassing committee hearings or simply through public criticism. For example, President Eisenhower demanded and obtained the resignation of FCC Commissioner Mack following a congressional investigation. See *supra* note 328. For other examples of successful legislative efforts to force the ouster of high-ranking executive officials, see L. FISHER, *supra* note 61, at 96-97.

Of course, not all requests for resignation are honored, as *Humphrey's Executor* clearly demonstrates. See also W. GELLHORN, C. BYSE & P. STRAUSS, *supra* note 327, at 130 n.6 (discussing refusal of member of Commodity Futures Trading Commission to accede to President Carter's demand for resignation).

³³³ S. BREYER & R. STEWART, *supra* note 300, at 124; A. & O. HOOGENBOOM, *supra* note 105, at 182-84, 187-89; Bruff, *supra* note 165, at 463 n.56; Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. 169, 184, 187-88 (1978).

The significance of the power to appoint is magnified by the frequency with which members of administrative agencies depart before the end of their terms. Even for agencies with terms ranging from five to seven years, Presidents typically are able to appoint a majority of commissioners within two years of taking office. Goodsell & Gayo, *Appointive Control of Federal Regulatory Commissions*, 23 ADMIN. L. REV. 291, 295-96 (1971).

³³⁴ See generally S. BREYER & R. STEWART, *supra* note 300, at 124-25; Bruff, *supra* note 165, at 491-95.

³³⁵ Strauss, *supra* note 74, at 614.

noted, it is not altogether clear that every statute that gives the legislative branch a limited role in removals runs afoul of the separation-of-powers doctrine.³³⁶

If the chief executive exercises less direct authority over the so-called independent agencies than over those agencies explicitly located within the executive branch, he does so for reasons having almost nothing to do with the formal rules governing removals. This does not mean that the power to discharge is itself unimportant; someone must have that authority if the government is to function properly. Under our Constitution, by way of practice and of judicial construction, that power belongs to the President. Except as to officials who perform substantial adjudicative functions or who serve as intimate advisors to the chief executive, whether the President has unfettered authority to fire or may dismiss only for cause really does not matter. If the existence of administrative agencies outside the three branches provided for in the Constitution cannot be justified,³³⁷ that is so for reasons entirely separate from the President's inability to fire commissioners for any reason or for no reason at all. It greatly disserves the cause of informed debate over public policy to pretend otherwise.

V. GRAMM-RUDMAN-HOLLINGS AND POLITICAL ACCOUNTABILITY

If the *Bowsher* opinion seems unsatisfying, the result may not be unjustifiable. A more acceptable rationale, however, would rely not upon the problematic removal doctrine, but instead upon the impropriety of delegating the important budgetary functions involved in Gramm-Rudman-Hollings to unelected officials. Indeed, that was the principal basis of the challenge to

³³⁶ See *supra* notes 216-17 and accompanying text.

³³⁷ Administrative agencies have long occupied an uncertain and somewhat anomalous place in our tripartite governmental structure. See, e.g., *FTC v. Ruberoid Co.*, 343 U.S. 470, 487-88 (1952) (Jackson, J., dissenting) (characterizing agencies as "a veritable fourth branch of the Government" that have "deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking" so much that "all recognized classifications have broken down"); PRESIDENT'S COMM. ON ADMINISTRATIVE MANAGEMENT, *ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES* 36 (1937) (characterizing agencies as a "headless fourth branch"). See generally Rabin, *supra* note 181; Strauss, *supra* note 74.

the Act in the district court. It was the executive branch, a nominal defendant, which most vigorously argued that the procedure for removing the Comptroller General rendered the automatic expenditure-reduction mechanism invalid.³³⁸

Only Justice Stevens devoted any attention to the delegation issue, and his analysis differed from that of the parties. For him, the statute's crucial defect was its assignment of "the duty to make policy decisions that have the force of law"³³⁹ to a congressional agent, the Comptroller General.³⁴⁰ Justice Stevens explained: "If Congress were free to delegate its policymaking authority to . . . one of its agents, it would be able to evade [the constitutional requirements for the enactment of legislation]."³⁴¹ The danger of congressional evasion of these constitutional restraints "is not present when Congress delegates lawmaking power to the executive or to an independent agency."³⁴² Thus, for Justice Stevens, the relationship of the delegate to Congress, rather than the fact of delegation, is dispositive.

This analysis relies heavily upon the Court's opinion in *INS v. Chadha*,³⁴³ which invalidated the legislative veto. Yet the concerns underlying that decision seem curiously misplaced in the Gramm-Rudman-Hollings context. In particular, the legislative veto tended to divert congressional attention from fundamental policy concerns toward the minutiae of administration, give inordinate weight to sophisticated or well-connected inter-

³³⁸ See 626 F. Supp. at 1391. The plaintiffs also argued the removal issue, however. *Id.* at 1378.

³³⁹ 106 S. Ct. at 3203 (Stevens, J., concurring in the judgment).

³⁴⁰ Justice Stevens concluded that the Comptroller General is an agent of the legislative branch after analyzing all of the duties assigned to that official by numerous statutes. He recognized that the Comptroller owes some obligations to the executive branch but found these obligations distinctly secondary to the Comptroller's responsibilities to Congress. *Id.* at 3196-99 (Stevens, J., concurring in the judgment).

The dissenters vigorously disputed this analysis. *Id.* at 3213 n.13 (White, J., dissenting); *id.* at 3215 n.1 (Blackmun, J., dissenting). Resolution of the question whether the Comptroller General should be characterized as an agent of Congress is unnecessary in light of the approach adopted in this section of the text. See *infra* notes 343-47 and accompanying text.

³⁴¹ 106 S. Ct. at 3203 (Stevens, J., concurring in the judgment).

³⁴² *Id.* (footnote omitted).

³⁴³ 462 U.S. 919 (1983).

ests, enhance the role of committee staffs, and destabilize the policymaking process by increasing the possibility of stalemate arising from conflicts between agencies and one or both houses of Congress, unchecked by presidential participation.³⁴⁴ Gramm-Rudman-Hollings, by contrast, effectively removed members of Congress from an important aspect of the policymaking process by relieving them of the necessity of voting for politically unpalatable expenditure reductions. Both the structure and purpose of the Act suggest that any delegate could operate with almost complete freedom from outside influence.³⁴⁵

The independence of the Comptroller General in this process does not mean that the functions assigned to him could be performed by anyone with a pocket calculator.³⁴⁶ As Justice Stevens pointed out, those functions require the exercise of

³⁴⁴ See, e.g., *id.* at 946-51; Bruff, *Legislative Formality, Administrative Rationality*, 63 TEX. L. REV. 207, 221-22 (1984); Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369 (1977); Nathanson, *supra* note 93, at 1091.

³⁴⁵ Whatever pressure the delegate receives probably will be aimed at eliciting a sufficiently low projected deficit that the automatic expenditure-reduction mechanism will not be triggered. It seems most unlikely that anyone would seek to influence the delegate to exempt a particular program from statutorily mandated spending cuts.

³⁴⁶ Recently the Court has evidenced some concern for the competence of the delegate. For example, one decision invalidated a Civil Service Commission regulation barring noncitizens from most federal employment; the Court emphasized the Commission's lack of responsibility for or expertise in foreign affairs and immigration and naturalization policy, interests asserted in justification of the regulation. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 114-16 (1976). Similarly, in the leading case invalidating the legislative veto, Justice Powell found Congress' lack of institutional capacity to make decisions of an essentially judicial nature crucial to his conclusion that the legislative veto provision in the Immigration and Nationality Act was unconstitutional. *INS v. Chadha*, 462 U.S. at 960, 963-67 (Powell, J., concurring in the judgment). See also J. FREEDMAN, *CRISIS AND LEGITIMACY* 78-94 (1978) (discussing other aspects of delegation and institutional competence).

No one questioned the Comptroller General's competence to carry out the duties assigned him under Gramm-Rudman-Hollings. Many of the Comptroller's other duties require him to make economic projections and evaluate public expenditures. See 106 S. Ct. at 3196-98 (Stevens, J., concurring in the judgment). These duties differ in their scope and complexity from those involved in Gramm-Rudman-Hollings, but it would be difficult to maintain that the differences are so great as to render the Comptroller technically incapable of performing them. It is not as though Congress had delegated the performance of these functions to, say, the Public Printer or the Chief of Protocol of the State Department, neither of whom has any responsibilities remotely related to those involved in Gramm-Rudman-Hollings.

"sophisticated economic judgment" on a variety of subjects.³⁴⁷ It does mean, though, that a more appropriate perspective on the delegation issue would focus elsewhere than upon the relationship of the delegate to the legislative branch.

Although the Supreme Court almost uniformly has rejected such challenges,³⁴⁸ it has suggested that the crucial determinant of the validity of any delegation of legislative power is the specification of an "intelligible principle"³⁴⁹ or some "standards for the guidance of the [delegate's] action."³⁵⁰ For more than a generation, various decisions also have emphasized the importance of these standards as a basis for judicial review.³⁵¹ One important lower court decision went so far as to uphold the Economic Stabilization Act of 1970,³⁵² which empowered the President "to issue such orders and regulations [implementing wage and price controls] as he deems appropriate," based upon a "common lore" of price controls developed in wartime and upon the availability of judicial review of the orders and regulations actually issued.³⁵³

Judged against such lenient criteria, it is not surprising that the district court discerned sufficiently precise standards in Gramm-Rudman-Hollings. Congress specified the maximum deficit amount for the fiscal year that had begun on October 1,

³⁴⁷ 106 S. Ct. at 3199 (Stevens, J., concurring in the judgment).

³⁴⁸ See *supra* note 253 and accompanying text.

The Court's extreme deference toward broad delegations of legislative power has generated increasing criticism. See, e.g., J. ELY, *DEMOCRACY AND DISTRUST* 131-34 (1980); T. LOWI, *THE END OF LIBERALISM* 128-56, 297-303 (1969); Aranson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 7-17, 52-55 (1982); Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1229-46 (1985). *Contra* Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L., ECON. & ORG. 81, 85-91 (1985). The Court has recently implied that the delegation doctrine may have renewed vitality. See *INS v. Chadha*, 462 U.S. at 953 n.16.

³⁴⁹ *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

³⁵⁰ *Yakus v. United States*, 321 U.S. 414, 426 (1944).

³⁵¹ See, e.g., *Fahey v. Mallonee*, 332 U.S. 245, 250 (1947); *Yakus v. United States*, 321 U.S. 414, 425-26 (1944); see also *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 686 (1980) (Rehnquist, J., concurring); *United States v. Robel*, 389 U.S. 258, 275 (1967) (Brennan, J., concurring); *Arizona v. California*, 373 U.S. 546, 626 (1963) (Harlan, J., dissenting in part).

³⁵² Pub. L. No. 91-379, 84 Stat. 799 (expired 1972).

³⁵³ *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 748, 760-62 (D.D.C. 1971).

1985, and for each of the five succeeding fiscal years; it provided detailed instructions on how to implement any expenditure reductions necessary to comply with the terms of the Act; and it instructed the officials charged with projecting the deficit to make particular assumptions in calculating the budget base. Moreover, just as previous experience with price controls formed part of the background of the Economic Stabilization Act, years of experience in projecting budgetary data under the Congressional Budget Act of 1974³⁵⁴ gave meaning to Gramm-Rudman-Hollings.³⁵⁵ From this perspective, the congressional failure to identify or define the numerous political and economic variables that inevitably affect the magnitude of the deficit was not fatal to the delegation.³⁵⁶

Although this rather traditional lack-of-standards argument appears unpromising, there is a much more substantial objection to Gramm-Rudman-Hollings: that decisions respecting the budget may not be delegated at all. This proposition goes to the heart of the statute. It suggests that the identity of the delegate, the technical competence of the delegate, the relationship of the delegate to both Congress and the President, and the procedure for removing the delegate from office are irrelevant to the basic concern. Instead, this objection emphasizes that the political branches have abdicated their responsibility to make the fundamental judgments about the size, shape, and priorities of the federal government in all aspects of national life.

The notion that politically accountable actors must make certain fundamental policy decisions has deep roots in American law, especially the law relating to delegation. The Supreme Court has implied that Congress may not delegate the taxing power³⁵⁷ and that delegations which have the effect of placing substantial

³⁵⁴ Pub. L. No. 93-344, 88 Stat. 297 (codified as amended in scattered sections of 2 U.S.C. (1982 & Supp. III 1985)).

³⁵⁵ See 626 F. Supp. at 1387-89.

³⁵⁶ The challengers especially emphasized these omissions in their arguments on the delegation issue. See Brief of Appellees Mike Synar, Member of Congress, *et al.* at 36-38; Brief for Appellee National Treasury Employees Union at 22-26.

³⁵⁷ *National Cable Television Ass'n v. United States*, 415 U.S. 336, 340-41 (1974) (characterizing taxation as "a legislative function" and finding it to be "a sharp break with our traditions" to conclude that Congress had delegated that function to an administrative agency); see J. FREEDMAN, *supra* note 346, at 80-88.

governmental power in private hands may pose serious constitutional questions.³⁵⁸ Further, several justices in separate opinions have suggested that the validity of legislation may depend upon whether Congress actually has made important and permissible policy judgments.³⁵⁹ Most significantly, the Court has decided a long line of cases involving legislative apportionment and political districting,³⁶⁰ cases that were specifically reaffirmed and extended last Term in a case that held claims of partisan gerrymandering to be justiciable.³⁶¹ These decisions are predicated upon the proposition that the Constitution guarantees "fair and effective representation for all citizens."³⁶² Resolution of the complexities of the concept of "fair and effective representation" is beyond the scope of this Article.³⁶³ For present purposes, it is enough to say that these decisions rest upon a belief that determining who sits in legislatures affects what policies are adopted.³⁶⁴ At a minimum, this belief requires the

³⁵⁸ The Court has made this point in various contexts. With respect to delegations at the federal level, see *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936). See generally Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201 (1937). For discussion of delegations at the state and local levels, see, e.g., *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 120-22 (1982); *Washington ex rel. Seattle Trust Co. v. Roberge*, 278 U.S. 116, 121-22 (1928); *Eubank v. City of Richmond*, 226 U.S. 137, 143-44 (1912); but see *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976). See generally F. MICHELMAN & T. SANDALOW, *MATERIALS ON GOVERNMENT IN URBAN AREAS* 111-55 (1970).

³⁵⁹ See, e.g., *Schweiker v. Wilson*, 450 U.S. 221, 244-45 & n.5 (1981) (Powell, J., dissenting); *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 180-81 (1980) (Stevens, J., concurring in the judgment); *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 685, 687 (1980) (Rehnquist, J., concurring).

³⁶⁰ E.g., *Karcher v. Daggett*, 462 U.S. 725 (1983); *Rogers v. Lodge*, 458 U.S. 613 (1982); *Wesberry v. Sanders*, 376 U.S. 1 (1963); *Baker v. Carr*, 369 U.S. 186 (1962).

³⁶¹ *Davis v. Bandemer*, 106 S. Ct. 2797, 2803-07 (1986).

³⁶² *Reynolds v. Sims*, 377 U.S. 533, 565-66 (1964). Accord, e.g., *Whitcomb v. Chavis*, 403 U.S. 124, 141 (1971); *Burns v. Richardson*, 384 U.S. 73, 92 (1966).

³⁶³ For discussion of various theories of and justification for representation, see, e.g., R. DIXON, JR., *DEMOCRATIC REPRESENTATION* 24-33 (1968); Mansfield, *Impartial Representation*, in *REPRESENTATION AND MISREPRESENTATION* 91, 110-13 (R. Goldwin ed. 1968); Pitkin, *The Concept of Representation*, in *REPRESENTATION* 1, 6-23 (H. Pitkin ed. 1969). See also A. BICKEL, *POLITICS AND THE WARREN COURT* 196-98 (1965); Baker, *One Person, One Vote: "Fair and Effective Representation"?*, in *REPRESENTATION AND MISREPRESENTATION* 71, 77-81 (R. Goldwin ed. 1968).

³⁶⁴ See, e.g., R. MCKAY, *REAPPORTIONMENT* 55-58 (1965). But see R. DIXON, *supra* note 363, at 574-81 (suggesting only a modest correlation between malapportionment and substantive policies).

further assumption that legislators actually will vote on those policies rather than delegating the most fundamental political judgments to appointed officials who are not directly accountable to the electorate. Gramm-Rudman-Hollings, by enabling Congress to do just that, violated this cardinal principle.³⁶⁵

The district court almost summarily disposed of this *per se* nondelegability argument. The court reasoned that delegations of the powers to tax and to declare certain conduct criminal, which it viewed as at least as important as the spending power, had been upheld. Further, the lower court could discern no principled basis for identifying those core functions which Congress may not delegate.³⁶⁶

Each aspect of this analysis is superficially appealing but ultimately unsatisfying. Most of the earlier decisions upholding delegations involved specific factual determinations concerning particular foreign policy matters that were peculiarly within the special competence of the President, new or highly technical subjects, or the management of public property.³⁶⁷ The case upon which the district court principally relied in rejecting the non-delegability claim³⁶⁸ will not bear the weight placed upon it. That decision simply upheld a statute authorizing the President to adjust tariff rates, a situation in which "the scope of the power and the discretion involved [were] fairly limited."³⁶⁹ By contrast, Gramm-Rudman-Hollings delegated the power to make binding decisions respecting public expenditures to an appointed officer who has never had to account for his actions to the electorate.³⁷⁰

³⁶⁵ The notion that Congress may not delegate certain essential political judgments to appointed officers who are not publicly accountable receives analogical support from the field of corporate law. Although the board of directors of a corporation generally has broad discretion to create committees, it may not under any circumstances delegate some vital functions that substantially affect the rights of shareholders to itself. Those functions include decisions relating to the declaration of a dividend, most mergers, sales of substantially all the corporate assets, amendments to the articles of incorporation, and voluntary dissolution. See generally ABA-ALI MODEL BUS. CORP. ACT § 8.25(e) & Official Comment (3d ed. 1984).

³⁶⁶ 626 F. Supp. at 1385-86 & n.10.

³⁶⁷ See G. ROBINSON, E. GELLHORN & H. BRUFF, *THE ADMINISTRATIVE PROCESS* 70-71 (3d ed. 1986).

³⁶⁸ *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928).

³⁶⁹ Aranson, Gellhorn & Robinson, *supra* note 348, at 8.

³⁷⁰ Brooks, *Gramm-Rudman: Can Congress and the President Pass This Buck?*, 64 TEX. L. REV. 131, 134-37 (1985).

Thus, the extent of the delegation was considerably broader than those which the district court cited in support of its conclusion. Even more troubling, that court also failed to note the unusual importance of the budget for the making of public policy.

The centrality of the budget to our politics, in the highest sense of the term, has long been recognized. The budget has been characterized as "the nearest thing available to an agenda for [the] struggle over [the] scope and shape of government"³⁷¹ and as the record of the outcome of the "conflict over whose preferences shall prevail in the determination of national policy."³⁷² As Aaron Wildavsky has explained:

The size and shape of the budget is a matter of serious contention in our political life. Presidents, political parties, administrators, Congressmen, interest groups, and interested citizens vie with one another to have their preferences recorded in the budget. The victories and defeats, the compromises and the bargains, the realms of agreement and the spheres of conflict in regard to the role of national government in our society all appear in the budget. In the most integral sense the budget lies at the heart of the political process.³⁷³

In short, Gramm-Rudman-Hollings represented an extraordinary flight from political responsibility by the nation's elected officials.³⁷⁴ To be sure, these officials might require the advice

³⁷¹ R. NEUSTADT, *supra* note 4, at 83.

³⁷² A. WILDAVSKY, *supra* note 14, at 4. The same scholar observes that "[t]he crucial aspect of budgeting is whose preferences are to prevail in disputes about which activities are to be carried on and to what degree, in the light of limited resources." *Id.* at 129.

³⁷³ *Id.* at 4-5.

Further evidence of the crucial political importance of governmental budgets comes from the New England town meeting, perhaps the prototypical democratic institution in the United States. The budget almost invariably is the first item on the warrant (or agenda) of the town meeting, although no statute requires this practice. *See* CONN. GEN. STAT. ANN. § 7-3 (West 1972 & Supp. 1986); ME. REV. STAT. ANN. tit. 30, § 2052 (West 1978); MASS. GEN. LAWS ANN. ch. 39, § 10 (West 1985); N.H. REV. STAT. ANN. § 39-2 (Repl. ed. 1970); R.I. GEN. LAWS ANN. § 45-3-8 (1980); VT. STAT. ANN. tit. 17, §§ 2641-2642 (1982 & Supp. 1986).

³⁷⁴ Indeed, the principal sponsors frankly admitted that they had introduced their legislation out of frustration over the failure of previous attempts to reduce the deficit. *See, e.g.*, 131 CONG. REC. S12082 (daily ed. Sept. 25, 1985) (remarks of Sen. Gramm); *id.* at S12085 (daily ed. Sept. 25, 1985) (remarks of Sen. Rudman).

of specialized professionals to calculate specific figures under various economic assumptions. Nevertheless, the results of those calculations must be formally approved by politically accountable elected officials precisely because the contents of the budget reflect fundamentally political judgments. The inability or unwillingness of both Congress and the President to perform this essential function suggests a serious breakdown of governmental processes.

Although Gramm-Rudman-Hollings was a substantial abdication of responsibility by the political branches, a conscientious Court still might have been reluctant to invalidate the law on delegation grounds. First, even if the law were enacted due to a failure of political will, it might have been the only means available for dealing with what was widely viewed as a serious national problem. Perhaps, in other words, members of Congress accepted Gramm-Rudman-Hollings as a sort of public policy lottery; no majority could agree upon precisely what should be done, but an actual majority thought some new policy was appropriate and regarded the possibilities under this legislation as superior to preserving the *status quo*.³⁷⁵

Second, although the authorities invoked by the district court ultimately are unpersuasive on the point, a holding that some legislative functions are absolutely nondelegable might call into question the validity of a great deal more of the activities of the modern administrative state than a ruling based upon the arcana of the removal power. Numerous agencies with responsibility for broad aspects of the nation's economic and social affairs enjoy extensive authority to promulgate regulations that have the force of law. Violators of some of these regulations face substantial civil and, in many instances, criminal liability. Even the most carefully phrased judicial opinion necessarily would leave serious ambiguities and cast long shadows that could not be eliminated by a minor statutory amendment.

Third, precisely because an expansive holding of *per se* nondelegability could have such broad ramifications, a court might conclude that the standards contained in the statute, while less

³⁷⁵ See Aranson, Gellhorn & Robinson, *supra* note 348, at 60-62; Mashaw, *supra* note 348, at 85.

precise than they might have been, provided sufficient guidance both for the Comptroller General and for any judicial tribunal called upon to review the implementation of the law. The Act contained specific assumptions to be used in projecting the deficit and provided a formula for the allocation of any required spending reductions. Although the Act did not offer guidance concerning the broader economic assumptions to be incorporated into the estimates of revenues and expenditures, and although economic forecasting is as much art as science, it is far from certain that Congress could have elicited more accurate data about those large questions through legislation than by delegation of the entire problem to the informed judgment of the Comptroller General and the other officials involved in the process.

Finally, a judicial remedy for even the most serious forms of political irresponsibility may not be appropriate. Members of Congress are accountable to the electorate at regular intervals. If their inability or unwillingness to take a position on a major national issue offends their constituents, the voters will have an early opportunity to make their displeasure known in the most effective possible fashion: by defeating irresponsible incumbents at the polls.

Resolving these problems is a task for another day. For now, it suffices to say that they were the important questions in the *Bowsher* litigation. Requiring Congress and the President, rather than the Comptroller General or any other appointed official, to make fundamental political decisions fixes responsibility for those decisions upon actors who are accountable to the electorate. The voters, in turn, may approve or disapprove of those decisions, or they may not care about them at all. They at least will have an opportunity to pass judgment upon the actors who made the ultimate decisions. Vesting this authority in appointed experts suggests that the federal budget has become too important to be left to the politicians. That suggestion has profound and troubling implications for our system of government.³⁷⁶ Unfortunately, none of the opinions even allude to such questions.

³⁷⁶ See, e.g., Elliott, *supra* note 26, at 1086-104.

CONCLUSION

Interbranch disputes are a perennial feature of American government. Two models have emerged for resolution of such problems. One focuses with increasing formality upon maintaining the separation of legislative, executive, and judicial powers. The other emphasizes a more contextual analysis of the checks and balances that might prevent one branch from aggrandizing its position at the expense of another. Just as the dynamics of our political system assure the inevitability of interbranch conflict, so also does this reality guarantee that the debate between the more absolutist separation-of-powers advocates and the more flexible checks-and-balancers will not cease. Indeed, the vicissitudes of politics suggest that many individuals will find themselves switching camps as new and unforeseen situations arise.

Controversy over the removal power has been the source of recurrent conflict between Congress and the President. Although it is necessary to have some generally accepted principles on this subject, executive claims to exclusive prerogative and judicial attempts to limit legislative participation are unlikely to resolve the underlying tension. Whatever rule governs, Congress has less drastic weapons in its arsenal that give it more effective control over administrative behavior than the draconian sanction of removal.

For this reason, the Court's highly formalistic opinion resolving the litigation over Gramm-Rudman-Hollings was intellectually unsatisfying. The Court's conclusion followed from the somewhat dubious premises of the precedents dealing with the removal power. A more persuasive solution was available, but only at the cost of raising doubts about the constitutionality of the modern administrative state.

One might speculate that at least some members of the Court understood the larger questions posed by so serious an abdication of responsibility by the political branches but also shrank from the implications of answering those questions. Those justices might have expected a narrow holding based upon the removal issue to force the political branches to do what they should have done in the first place to reduce the deficit without causing doctrinal confusion. Thus, this approach could be seen as a means of conserving judicial capital. In light of Congress'

failure to agree upon how to repair the Gramm-Rudman-Hollings mechanism, the Court's gamble may be said to have paid off. This institutional success, however, cannot conceal a more disturbing irony: a lawsuit brought to promote political, and especially legislative, responsibility produced a result that at least rhetorically enhances executive power.